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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 224.

THE BOARD OF TRADE OF THE CITY OF CHICAGO,
PETITIONER,

v.

CHRISTIE GRAIN AND STOCK COMPANY ET AL.

REPRINT OF BRIEF AND ARGUMENT FOR THE CHRISTIE GRAIN AND STOCK COMPANY ET AL. IN THE COURT BELOW.

W. H. ROSSINGTON,
CHARLES BLOOD SMITH,
CLIFFORD HISTED,
Counsel for Respondents.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 15609

The following is the brief for the Christie Grain and Stock Company et al. in the court below:

United States Circuit Court of Appeals,

EIGHTH CIRCUIT.

No. 1805.

CHRISTIE GRAIN AND STOCK COMPANY ET AL.,
APPELLANTS,

v.

THE BOARD OF TRADE OF THE CITY OF CHICAGO,
APPELLEE.

BRIEF AND ARGUMENT FOR APPELLANTS.

Statement of the Case.

A very full statement of this case is made by our colleagues in their separate brief filed herein, and it would be redundant and useless for us to reprint it here. For the purposes of this argument we adopt the statement of the case made in the brief of Messrs. Harkless, O'Grady & Crysler. To aid in

our argument, however, we will briefly restate the substantial elements of this case and the grounds of contention.

The appellee by its bill seeks the aid of a court of equity to prevent the appellants from using the current quotations of the Board of Trade of Chicago, made by transactions upon the board. These quotations arise from speculative sales and purchases of grain and provisions by brokers and agents for their principals. It is of necessity admitted that when these quotations are received and used by the appellants, the transactions have already taken place upon the board of trade and the reports of the same have already been delivered to the telegraph companies for transmission over their wires. The board seeks to follow the quotations into appellants' hands and assert a property interest in them of so absolute a nature as to warrant the interposition of a court of equity to prevent the use of them in appellants' business.

The bill in this case industriously shows, first, the magnitude of the operations upon the board of trade and their essential significance and importance in the transaction of the business of dealing in grain and provisions throughout the United States, and particularly in the territory where appellants are engaged in business. The court, of course, will take judicial notice that Kansas City is a large center of trade and commerce, that it has a large local grain and provision market, and it is an asserted fact by the appellee and admitted by the appellants that all the dealings in the commodities in question are controlled and governed by the result of similar transactions made upon the board of trade in Chicago.

The bill sets out the purposes of the board of trade and its incorporation, and the paragraph from its charter defining its purposes and correlatively imposing its duties is as follows:

"To maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate

the speedy adjustment of business disputes; to acquire and disseminate valuable commercial and economic information and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits."

The record discloses that for a long time after the organization of the board and down to comparatively recent times the telegraph companies were allowed to freely compile, collate, and transmit to traders everywhere who might desire to use it the intelligence of the transactions upon the board of trade.

The object of disseminating this intelligence freely in the beginning of the business was obviously to increase the trade upon the board and to induce people to engage in such trade through the brokers who were members of the board of trade, and to thereby augment its importance as a factor in the commercial world. By this means the trade in these commodities was in a large degree concentrated upon this board, the unexampled growth of the city of Chicago as a general market incalculably aiding in this behalf. Independent trading, however, based upon these quotations began to assume large importance in many growing commercial centers of the West and South. There were undoubtedly a large number of what are familiarly termed "bucket-shops" in many localities, which carried on an illegitimate business, using these quotations merely as gamble use the markers upon the gambling board. The moral delinquencies of such persons, however, have in most of the States been corrected, or sought to be corrected, by stringent laws denouncing such business as unlawful and punishing those engaged in it as misdemeanants. But there have been and are now established numerous independent commission houses trading among their own customers in the commodities in question upon a plan as legitimate and honorable as that of the brokers constituting the board of trade. It is conceded in this case that appellants are within this class.

There were thus two classes of people engaged in the legitimate business of dealing in grain and provisions in this country, namely, the brokers of the Board of Trade of Chicago and those of other boards having alliances with that board and independent brokers and commission houses in no way connected with appellee. The appellee discovered that these independent dealers were securing business which otherwise would come to the brokers upon the board of trade. Thereupon it sought to destroy all such independent business by passing a rule or order forbidding the dissemination of the quotations arising from transactions upon the board. It offered as a pretext for this drastic rule its desire to suppress so-called bucket-shops and to prevent unfair trading throughout the country. This policy seems not to have accomplished either the actual or the pretended purpose of the board. Notwithstanding the order, quotations were disseminated practically as freely as ever.

In 1892 it threw open its doors to the telegraph companies once more, without let or hindrance, and permitted them through their own agencies to collect these reports and transmit them to whomsoever wanted them and would pay for them. The board of trade received nothing for these quotations. This continued for eight years. In other words, from the organization of the board of trade down to 1900, with the exception of two years, appellee voluntarily and freely disseminated this information through the telegraph agencies to the public, unreservedly and without condition. Any person desiring them could obtain them by an arrangement with the telegraph company for such service. In brief, these quotations were given to the public without discrimination from 1858 to 1890 without even an assertion by appellee that it had any peculiar right of property in such quotations. In 1890 its claim went simply to the extent that it could close its doors against the right of the public to acquire them at all.

This position it voluntarily abandoned in 1892, and for

eight years thereafter asserted no proprietary interest in the quotations. In 1900, for the first time, it exacted of the telegraph companies, as a condition to the use of the reports, a contract. This contract required the telegraph companies to pay to the board of trade $30,000 a year and to further submit to the absolute control and direction of the board as to all persons who might be permitted to receive them. We will discuss this contract at length when we reach that branch of our argument.

The bill proceeds upon the primary assumption that the quotations constitute property, the dissemination of which the complainant has a right to regulate at its will; that the appellants' use of them injuriously affects the board of trade, because appellants are engaged in the bucket-shop business; that the board has a right to suppress this illegal business by refusing the use of the quotations; that if it should be deprived of such dominion over its so-called property, it would be injured by loss of prestige and support on the part of the public which would connect it with such bucket-shop business. But it is an admitted fact in this case that this charge as to the character of appellants' business is untrue. The answer expressly and positively denies the allegations in that respect. Not a syllable of proof by way of deposition or affidavit was presented to the court in support of this all-important ingredient to the bill. Upon argument below, the charge was practically withdrawn by complainants' counsel, and will not be repeated here.

The case rests, then, if it can anywhere obtain support, upon an absolute and unrestricted right of property in these quotations by the board of trade, that its control in the regulation and distribution of them may not be questioned or reviewed, and that its contract with the telegraph companies is not subject to interference by the courts, acting for the public at large. In other words, that the board of trade may at all times determine and be the final arbiter of who shall or who shall not receive such quotations, and this with-

out reference to the legitimacy and fairness of the business engaged in by the applicant. It results, from this position, that the board asserts the right to capriciously and invidiously control an instrument of interstate commerce in the exercise of its public function, namely, in the dissemination of information and knowledge which the highest court of the State of appellee's creation has declared to be impressed with a public use, and which must be furnished to all demanding without discrimination.

The bill suggests two injuries to be apprehended: one an injury to reputation, unless it can prevent the receiving of these quotations by bucket-shops, and the second a pecuniary injury of such peculiar character and so curiously elaborated and explained that we cannot restate it in a briefer or any form of words, but must quote it (p. 6):

"That your orator realizes from the sale of said quotations in the city of Chicago alone, more than $10,000 per year, but that said quotations are of such a peculiar kind of property that their value and your orator's ability to sell the same depend upon your orator's retaining the power to confine the transmission and distribution of said quotations to such telegraph companies, and other distributing agencies, as will contract therefor with your orator, and the value of said quotations to your orator will be much impaired, if not wholly lost, if persons are allowed to receive or take without right, or surreptitiously, or by theft, and when so acquired, to use the same or distribute them to the public for use—the value to your orator of said quotations depending upon your orator's preventing the said quotations from being generally or surreptitiously published in a way to make them free to the public; for if any telegraph company or other person is permitted to promptly acquire said quotations surreptitiously or by theft, and without paying your orator therefor, the telegraph companies contracting with your orator for said quotations and agreeing to pay your orator therefor, will be put at such a disadvantage in competition with such telegraph companies or persons acquiring the same surreptitiously and without paying your orator therefor, as to prevent said contracting telegraph companies from long continuing to purchase said quotations from your orator."

As to this last ground of relief, it is needless to say no
oof is or could be taken. At most, it is a deduction of the
eader which certainly is not obvious from the premises
awn. It would occur to the ordinary mind that exactly
e opposite result would follow from the increased demands
on the telegraph companies for these quotations.

It appears, then, that of these two foundations for relief
ted in the bill one is non-existent, namely, the bucket-
opping business, and the other is so shadowy, vague, and
leterminate as to be evanescent. The truth is that in this
important particular of pleading the draftsman of the bill
s not dealt with frankness, but has concealed the real
tive of this lawsuit and the persistence in its prosecution.
at motive, however, does not lie so far below the surface
hings as not to be discoverable, and a careful reading of
contract makes it palpable that its object, as well as the
rpose of this lawsuit in furtherance of its terms, is to create
onopoly in the board of trade in dealing in grain and
visions and to suppress all independent business, to com-
commission merchants to pay tribute and brokerage to
members of the Board of Trade of Chicago. It is absurd
ontend that this gigantic corporatien would be carrying
litigation near and far in many of the courts of the West-
States for the sake of enhancing petty earnings which it
ives from the telegraph companies for these quotations,
ch for more than forty years it cheerfully gave to the
lic for nothing; and it is equally absurd that it is moved
the high design of vindicating the bucket-shop laws of
various States.

Ve do not deem it necessary to repeat in terms the assign-
nts of error upon the record, because we shall confine our
uments to the errors which we believe to have been com-
ted by the court below in overruling and refusing to be
erned by the following propositions of law, the force and
lication of which to this case was by the court errone-
y denied. These are presented on the record, and from

the face of the contract set forth in appellee's bill, and the establishment of them is necessarily fatal to appellee's right of recovery.

Specifications of Error.

The court erred in denying the following propositions of law which are asserted by the appellants:

I.

The board of trade has not, nor did it ever have, any right of property in the quotations resulting in transactions by its members upon the board.

II.

Assuming the right of property in the board to these quotations, they have from long free and unrestrained usage become a matter of general commercial necessity, and have become impressed with a public interest and use. The board of trade is estopped from discriminating with reference to such public use.

III.

The contract with the telegraph companies, pleaded in complainant's bill, is not in the nature of a reasonable regulation of the use of such quotations, but is an unreasonable and restrictive measure for the purpose of creating a monopoly, which monopoly will not be furthered and protected by a court of equity, nor aided by the preventive remedy of injunction.

IV.

The contract made between the appellee and Western Union and Postal Telegraph Companies, and sought to be

enforced according to its terms in this suit, is violative of sections 1, 2, and 3 of the act of Congress of July 2, 1890, known as the Sherman anti-trust act.

V.

The contract is void as being a regulation of interstate commerce and a control and unauthorized direction of an instrument thereof, and is prohibited by section 8 of article I of the Constitution of the United States.

ARGUMENT.

The quotations not property, nor can they be impressed with a right of property by the board of trade.

We are bound to assume that the positions taken in argument in the court below by the appellee will be renewed here. We quote from a printed brief in another case which was filed by the complainant in the court below (p. 18):

"It is not claimed by appellants' counsel that this copyright law covers these quotations or protects the property right in them against purloiners. A perusal of the law will show that it includes, and under the Constitution could include, only authors and inventors. * * * (After copying the copyright statutes.) (P. 19:)

"From these and other provisions of the copyright law, it is perfectly clear that these quotations are not the productions of an author; that Congress had in view, when enacting that law, things of a permanent character and value, not things of an ephemeral character and value, such as are these quotations; and that the copyright law has no application to and affords no protection to the property right in these quotations * * * (p. 20).

"Nor does the common law directly cover these quotations. Commercial exchanges and the prices made thereon were unknown to the common law. The exchanges themselves are of recent date, and the products of the modern development of commerce. * * *

"They are a new kind of things. They represent new conditions calling for new law."

This vague and indefinite description of this claim of property interest in the brief in question gains no illumination from the allegations of the bill. In the bill appellee says (p. 5 of the Record):

"And the *knowledge* of the prices thus made on said transactions during said market hours upon said exchange have

become a species of property of such large value to your orator that telegraph companies are willing to pay your orator large sums of money for the privilege of receiving instantaneously said quotations and selling the same to their customers."

And again, on page 6, in the recital of the pecuniary injury which the appellee claims to apprehend and which we have heretofore quoted, it is said:

"For if any telegraph company or other person is permitted to promptly acquire said quotations surreptitiously or by theft, and without paying your orator therefor, the telegraph companies contracting with your orator for said quotations and agreeing to pay your orator therefor, will be put at such a disadvantage in competition with such telegraph companies or persons acquiring the same surreptitiously and without paying your orator therefor, as to prevent said contracting telegraph companies from long continuing to purchase said quotations from your orator."

From this hazy and obscure definition of its property rights by the counsel of appellee is to be gathered the claim, if any clear conception can be gathered, that the property consists in the *knowledge* of these individual transactions and the resulting market quotations. The court which awarded this injunction has an entirely different notion of the element of property in the board of trade entitled to judicial protection. It says (p. 956 of the Record):

"The board of trade has at least a qualified property right in the *records* of the transactions between its members and in the distribution thereof. Such *records* constitute the quotations in controversy in this case. That the quotations are the subject of a property interest and that the complainant has some right with reference thereto is generally recognized by the decisions of the court."

Appellee's claim goes further and asserts that there is an element of property in the knowledge of the multitudinous facts which such record, if any were kept, must contain.

The failure, therefore, to keep such record could not exclude the existence of such facts nor diminish the property right in such knowledge. The vague and uncertain assertion and description of what constitutes the property right and interest and the differences between the court and counsel in this respect illustrate at the outset the extreme difficulty, if not impossibility, of finding any of the tangible ingredients of property in legal contemplation in these quotations.

Property of this character, if existent and definable at all, must rest in analogy, at least, to literary property and inventions, the product of the human mind. If it cannot find some support by analogy in such element of property, then it is too intangible and evanescent to be apprehended by the law. That this deduction is fair and just is evidenced by the argument of appellee, which draws all of its analogies from judicial determinations and definitions of property of this character.

There are two theories of ownership in mental creations which are radically opposed to each other and which have been and probably always will be the subject of vigorous contention. The one theory is that intellectual creations are property like unto other species of property and belong by right of the highest possible title to their creator, his heirs and assigns, forever. It is contended that, no matter whether published or unpublished and to the end of time, they are to be secured to the producers and their successors to the same extent as other species of property; that the public has no more justification to take away or impair the originator's property in his mental product, either in law or in morals, than to deprive him of any other property. Many eminent jurists of England adopted this theory and it finds great support with the text-writers. However attractive it may be, it has failed to prevail with the courts.

The other theory, and the one which has been generally accepted by the courts, is that the producer of a work of the intellect has no natural property in it and can only enjoy

such rights in respect thereto as the public may choose to confer. Under this theory a writing and work of art or a musical composition may be said to be a contribution to the common stock of knowledge and enjoyment of mankind, a labor for the benefit of civilization, which the public should generously reward, to be sure, but which is, after all, a heritage of the human race. Even Lord Mansfield, the great advocate of the opposing theory, is not oblivious to this view. In *Sayre v. Moore*, 1 East, 361, he says:

"The rule of decision in this case is a matter of great consequence to the country. In deciding it, we must take care to guard against two extremes, equally prejudicial—the one that men of ability who have employed their time for the service of the community may not be deprived of their just merits and the reward of their ingenuity and labor; the other that the world may not be deprived of improvements nor the progress of the arts be retarded."

It is further to be observed that even the exponents of the first theory concede that this right does not exist in the inventor, but only argue for it in favor of the literary author. It is hard to reconcile this distinction with any idea of fairness or logic. Certainly the ideas of the inventor are no less valuable than those of the author. If the one is entitled to property, it is hard to see why it should be denied to the other.

The great case of *Millar v. Taylor*, 4 Burr., decided by the King's Bench in 1769, presents the arguments in favor of these opposing theories of property. All the justices taking part in that decision gave their individual opinions at length, and they have furnished the armory from which all advocates of the one or other proposition have drawn their weapons since. The fundamental principles of property are there discussed with that thoroughness and clearness of preception which characterized that age of judicial giants. Mr. Justice Willes, Mr. Justice Aston, and Lord Mansfield held that at common law a right of literary property exists which

is not destroyed by publication, and the duration of which was not diminished by the statute of 8 Anne, the first English copyright law. Mr. Justice Yates took the dissenting view in an opinion of great length, and, as said by the Supreme Court of the United States, "with an ability if equaled, certainly not surpassed" (*Wheaton v. Peters*, 8 Pet., 226). The question was not settled by this decision in England, and, in 1774, the House of Lords distinctly overruled the doctrine of the majority opinion of *Millar v. Taylor*, and declared the law to be that property right in literary productions, after they are once published, does not exist at common law, but depends upon the copyright statutes alone.

See *Donaldson v. Beckett*, 2 Bro. P. C., 129, 138.

There is said to be a fuller report with all the opinions and speeches condensed in 17 Hansard's Parl. Hist., 953. It is curiously to be observed that Thompson's "Seasons" was the publication involved in both cases.

This rule has prevailed ever since in England.

See *Jefferys v. Boosey*, 4 H. L. Cas., 815.

In the United States the first theory alluded to has never received judicial recognition. From the outset the courts have consistently held that after publication the only rights of an author in his production are those secured by copyright statutes. In other words, that the effect of the copyright act is to create a right of property which did not before exist.

Wheaton v. Peters, 8 Pet., 223.

Mr. Justice Thompson filed an elaborate dissenting opinion in that case, which has been much quoted by the advocates of the unrestricted property right. It is to be noted, however, that the learned justice recognized the full force of the decision, because in the case of *Clayton v. Stone*, Fed. Case

2872, decided by him shortly afterwards, he commenced his opinion as follows:

"Copyright was formerly considered to be founded on common law, but it can now only be viewed as a part of our statute law."

"There can be no doubt of the authority of Congress to legislate on the subject of literary property, and to prescribe the terms upon which copyrights shall be granted, and when it has so legislated it may be truly said to create those rights under the law."

Crowe v. Aiken, 2 Biss., 214.

"The right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress."

Thompson v. Hubbard, 131 U. S., 151.

"But it is a proposition now so well settled as to be almost axiomatic, that, except so far as preserved to him by statute, when the composer of any work, literary, musical, or dramatic, has authorized its publication in print, his control over so much as he has so published, and of the use which others may make of it, is at an end (*Wheaton v. Peters*, 8 Pet., 591; Drone, Copyright, 101, 574, 577; *Boucicault v. Wood*, 2 Biss., 34; *Mark Twain Case*, 14 Fed. Rep., 728; *Tompkins v. Halleck*, 133 Mass., 32)."

The Iolanthe Case, 15 Fed., 442.

"It must be regarded as settled law in the United States that an author has no exclusive property in a published work except under some act of Congress, and then only when he complies with the provisions of the act."

West Pub. Co. v. Lawyers' Co-operative Pub. Co., 64 Fed., 364.

See also *Stowe v. Thomas*, Fed. Case No. 13514.

As we have said, the justices sitting in *Millar v. Taylor* discussed the rules of property from *a priori* principles. The reasoning in these various opinions of these great

justices is as fully applicable to a just decision of the rights of property in these market quotations as it is to the rights of property in a work of imagination, like Thompson's "Seasons."

The right of property in these quotations, where it has been judicially dealt with and conceded, has been, as we shall presently show, taken for granted by both parties to the controversy. No reference to cardinal principles has been indulged in in those decisions, nor has any court of last resort passed upon it at all. We therefore contend that it is a question at large and undecided and can only be rightly decided by the application of the principles of jurisprudence which were so learnedly considered and argued in *Millar v. Taylor* and cognate cases in England and in this country. We deny that these quotations are or can be made the object of property in any sense.

Of course it follows as a necessary consequence that if it be true that the board of trade does not possess a property right to these quotations, it is in no position to invoke the aid of this court to suppress their free and untrammeled dissemination. This is an obvious proposition which counsel for the appellee himself concedes. It therefore becomes important to analyze this claim of property and apply the test of well-established principles to it.

The board of trade has no property right or interest in or to the knowledge of the quotations as they arise from the transactions of its members upon the floor of the board.

What is the exact claim of the board of trade? What is the object of property here? Is it to the manuscript or slips of paper on which these figures are placed, or is it to the figures themselves? When does the board's property right attach? Is it at the moment the bid is made and accepted? Certainly such must be the contention, else, as there is no

claim that these papers or records on which the figures appear have been appropriated or interfered with, appellee's property has not been injured. The bill answers this (p. 5) to the effect that it is "*the knowledge of the prices* thus made on said transactions."

Quoting from the language of Mr. Justice Yates in 4 Burr., p. 2362:

"The fallacy lies in the equivocal use of the word property, which sometimes denotes the right of the person (as when we say, Such a one has this estate, or that piece of goods), sometimes the object itself. Here the question is upon the object itself, not the person."

We must therefore, in analyzing this claim, go to the very foundation of the quotations, which is the purchase or sale of a commodity by brokers in the pits. At this stage of our argument, then, we shall deal solely with the question of the right of property in the knowledge of these quotations as they arise. The compilation of the knowledge by the agencies of the board of trade and its use by the board of trade occur later and present another and a different question, which we shall discuss when we reach it. We are subjecting this claim of property to analysis with reference to its origin and elements, and for the present we are confining our argument to the knowledge of the transactions as they arise during business hours upon the board of trade.

It thus appears that the object of the property of which appellee claims to be the owner is the mental, evanescent, fleeting impression resulting from a bargain between two men; something which is not and cannot be visibly and distinctly enjoyed; wholly without substance to sustain it. Its whole existence must be in the mind alone. It is incapable of any other mode of possession or enjoyment than by mental possession or apprehension. Paraphrasing the language of Mr. Justice Yates, "safe and invulnerable from its own immateriality, no trespass can reach it, no tort affect it, no fraud

or violence diminish or damage it." Yet these figures are the phantoms which the appellee would grasp and confine to itself, and it is these of which the appellants are charged with robbing appellee. Analyzing this claim more closely, each one of these quotations, disassociated from all the rest, must be held to partake of those essential elements which constitute property, and the time when it necessarily became clothed with those attributes was at the very instant the particular sale was made.

Neither can the magnitude in number of these quotations alter the question. Mere increase of volume has never been a test of property. The air which fills a house can no more be the subject of property than that which fills a bottle, and for exactly the same reasons. If upon final analysis a single one of these quotations does not partake of the qualities of property, neither will all combined partake of those qualities.

We have seen that counsel for appellee concedes that its claim of property is not supported by the copyright statutes, and he further admits "nor does the common law directly cover these quotations." Counsel contends that this knowledge has become a "species of property" which should be recognized at the law from reasons of justice and propriety. Or, as he puts it in his brief, "but after all, what should most control are those broad considerations of the rights of individuals and public welfare which should be the basis of all law." In other words, the court is asked here to find a right of property, not by applying old principles drawn from the common law, but by making new law. In brief, by judicial legislation. The court is here asked to invent a principle of law in order to create and assert a right of the board of trade, and in so doing it is asked to indulge its views as to broad and abstract principles of justice.

The same contention was made in the case of *Millar v. Taylor*, in favor of a perpetual common-law right of authors to literary productions. Mr. Justice Willes, conceding that the principles of common law did not support a right of

property to such productions, nevertheless asserted a property right, because, from abstract principles of justice and propriety, he thought it was manifestly right that such property should be recognized. This attempt to create a property in defiance of the principles of common law and without the aid of a statute, was very properly answered in the later case of *Jefferys v. Boosey*, 4 H. L. Cas., by Lord Chief Baron Pollock, as follows (p. 935):

"In Mr. Justice Willes' judgment (giving a very able, elaborate and learned exposition of the whole subject) he appears to think that, because upon general principles he has satisfied himself of the justice and propriety of an author possessing such a right, therefore by the common law it exists. The passage is a remarkable one, and shows what were his views of the common law, and what, probably, he thought would not be considered strange or novel by the rest of the judges. It is this: He is speaking of the allowance of 'copy' as a private right, and he says 'It could only be done on principles of private justice, moral fitness and public convenience, which, when applied to a new subject, make common law without a precedent.' My Lords, I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the common law cannot create new rights, and limit and define them, because, in the opinion of those who administer the common law, such rights ought to exist, according to their notion of what is just, right and proper. This ground or method of arguing for a common-law right has not been adopted at your Lordship's bar."

The same subject was commented upon by the learned Judge Cadwallader in his opinion in *Keene v. Wheatley*, Fed. Cas. 7644, p. 192.

"Lord Mansfield and Willes, J., in 1769 (4 Burrows, 2398, 2399, 2395, 2396, 2312), and Aston, J., in 1774 (17 Cobb.

Parl. Hist., 980), were of opinion, that even in the absence of confidential relations, rules of decision on questions of literary proprietorship might be deduced from principles of 'private justice, moral fitness, and public convenience.' But Lord Eldon discarded this doctrine (3 Law, J., ch. 209). It has been criticised and condemned by De Gray, C. J. (17 Cobb. Parl. Hist., 990); Lord Camden (*id.*, 998); Pollock, C. B. (4 H. L. Cas., 935, 936), and Lord Brougham (*id.*, 968). Some of those judges conceded that what was manifestly against the public interest might for that reason be rejected from the law. But they all concurred that those who administer jurisprudence cannot on this, or any other subject, create and define rights merely because, in their opinion, such rights ought, according to justice, propriety and convenience, exist. Rules of decision on the subject of literary property, must, therefore, be sought in doctrines of the common law, or must be traced in principles from which its rules may appear to have been derived."

If, therefore, these quotations, originating in the way they do, can be said to be any one's property, the fact of proprietorship, ownership, must find its sanction and support in the existent rules and principles of the common law; and if not property by such rules, or, we might add, if not property, under any system of jurisprudence established by any civil society in the history of the world, then the court is powerless to declare it to be property and deal with it as such.

Of necessity, in seeking an analogy in the common law that may be persuasive upon the court in favor of his contention that these quotations are property, counsel for the board resorted to cases relating to literary property and invention, for with reference to these, and these alone, can it be said in the law that property is created as the object and result of intellectual effort; but tried by this touchstone these quotations are totally lacking in that essential quality.

There are several principles, elementary in their nature, which furnish a conclusive answer to the question now discussed.

The right of property to mental or literary effort rests fundamentally upon the creative faculty, which must have been exercised by the claimant or some one through whom his title is derived.

This is a principle so obviously true that it is found accepted without comment in all of the discussions upon the subject. In the case of literary proprietorship it is the crowning reason urged why the right should be recognized in the author, upon the principle *jus utendi et fruendi*. As said by Mr. Justice Aston in 4 Burr., 2340:

"There is a material difference in favor of this sort of property from that gained by occupancy; which before was common and not yours; but was to be rendered so by some act of your own. For this is originally the author's; and therefore, unless clearly rendered common by his own act and full consent, it ought to remain his."

The origin of this asserted right was put by Mr. Justice Yates in this form (p. 2357):

"It was argued that invention and labor are the means of acquiring property; and that literary compositions are the objects of the authors' sole pains and labor; therefore, they have the sole right in them."

From the most casual reading the bill demonstrates that this fundamental element is lacking in this case, because in no particular are these quotations the result of mental effort on the part of the board of trade. They are not produced by it. Most favorably considered, each is the labor of two brokers, not working for the board of trade, but merely availing themselves of the privileges and conveniences which the board of trade affords them. It is therefore owned, if at all, by one or both of those brokers and not by the appellee.

We, of course, can anticipate the answer to this assertion, that these quotations are in their essence private and not public, because they originate upon the floors of the board

of trade, access to which for trading purposes is denied to any but members of that board; but this, we contend, is no answer and is sticking in the bark of the proposition. The members, so far as their trading is concerned, act individually and independently. The only office of the board of trade is to furnish them a place and facility for such independent and individual action. It is not the board of trade that is dealing. It is not the board of trade that is creating these quotations, but the brokers engaged in business with the public and inviting business from the public. The brokers as individuals do business upon their own account with the public. If the board of trade had anything whatever to do with the fixing of these market prices, there might be something in this connection, but because the board of trade provides a four-square, within which this dealing may be done, it does not thereby acquire a right or interest in the subject of the transactions. It does not create these quotations. The first connection of the board with this "property" is after it has been created.

Moreover, each one of these quotations, as we have pointed out, must in and of itself possess all of the constituent elements of property. Therefore, the knowledge of these quotations, considered in gross, must be the object of ownership by many separate and distinct people, owning separate and distinct items, with no community of ownership whatsoever. More than this, in many instances, if indeed not all, these brokers are acting as agents for principals not members of the board. If this information can be referred to ownership, it must beto these principals, so that we further find a large element of ownership of this property resting with the public at large, and not even with any members of the board. The board could not assert a right of ownership against those principals whose transactions created it and who of all men can be said to own it, if capable of ownership at all.

Counsel for appellee has wholly failed to make this discrimination. The bill extends the claim of property to the

knowledge of these quotations as though the board of trade had produced them. The brief from which we have already quoted further shows this misapprehension of the origin of title (p. 23):

"While a lecture or a play differs from the quotations in that the former results from the exercise of mental power of a high order and has a permanent utility and value, and these quotations are but the result of a species of news-gathering, and possess only an ephemeral utility and value; still, they are alike in that both result from individual effort; they both meet the requirement that 'the origin of property is in production;' they are, when produced (gathered) within the exclusive dominion and control of the producer, who may give them to or withhold them from others, as he pleases, and they can be made a source of profit or income to the producer. The quotations cost money to collect, and persons will pay money for them. A play or lecture costs effort to produce, and persons will pay to hear it. Each has this same practical test of property."

It is apparent from what has been said that there is no similarity whatever between the case put in the brief by way of illustration and the case at bar. The matter of cost referred to in the extract from the brief is wholly apart from the question at issue here. The cost which the board claims to have expended is in gathering the quotations on the floor of the exchange, after they have been created. This "property" (if property at all) was in existence before the cost of compilation was incurred. The board is claiming an original title to these quotations as they arise from the transactions of members in the pits. It is obvious that this contention is unwarranted. The quotations do not represent any mental or other effort upon the part of the board or any outlay of money, and the analogy between its claim and that of the dramatic or literary author is wholly unwarranted in sound argument.

Nothing can be the object of property which has not a corporeal substance.

The statement of this proposition is its argument. The right to literary property is a right to the manuscript, an arrangement of words and ideas, and to that alone. The segregated and separate ideas and words making up such literary production are not and cannot be the subject of property. So, therefore, the literary property is corporeal to the extent that at common law, at least, it is limited to the manuscript, and the author of such manuscript is protected to the extent that it may not be stolen from him and set at large. It may be confidentially communicated to one who cannot, without authority, publish it. In brief, the author may retain and hold the usufruct of it for himself until he shall either voluntarily publish it or dispose of it to another to publish; but once published all element of property at once vanishes. That property must reside in a corporeal substance is convincingly and conclusively argued and stated by Mr. Justice Yates in *Millar v. Taylor, ubi supra*, whose views in that respect, and in all others, were early considered by the Supreme Court of the United States in the case of *Wheaton v. Peters*, above cited, and necessarily adopted and affirmed. We quote from Mr. Justice Yates' opinion (p. 2361):

"And it is a well-known and established maxim (which I apprehend holds as true now as it did 2,000 years ago) 'that nothing can be an object of property which has not a corporeal substance.'

"There may be many different rights, and particular distinct interests in the same subject; and the several persons entitled to these rights may be said to have an interest in them; but the objects of them all, the principal subject to which they relate, or in which they enjoy, must be corporeal. And this, I apprehend, is no arbitrary, ill-founded position; but a position which arises from the necessary nature of all property. For property has some certain, distinct and separate possession; the object of it, therefore, must be some-

thing visible. I am speaking now of the object to which all rights are confined. There must be something visible which has bounds to define it, and some marks to distinguish it. And that is the reason why these great marks are laid down by all writers. It must be something that is visibly and distinctly enjoyed; that which is capable of all the rights and accidents and qualities incident to property; and this requires a substance to sustain them.

"But the property here claimed is all ideal; a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment, than by mental possession or apprehension; safe and invulnerable from their own immateriality; no trespass can reach them, no tort affect them, no fraud or violence diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of.

"In answer to these objections, it was alleged for the plaintiff 'that there are many other instances of incorporeal rights; such as all the various kinds of prescriptive rights and partial claims.'

"But the fallacy lies in the equivocal use of the word 'property;' which sometimes denotes the right of the person, as when we say 'such a one has this estate, or that piece of goods,' sometimes the object itself.

"Here the question is upon the object itself, not the person. I readily admit that the rights of persons may be incorporeal.

"But the question is now, 'whether anything can be the object of proprietary right, which is not the object of corporeal substance.' And for my own part, I know not of any one instance of any one right which has not respect to corporeal substance. Every prescriptive inheritance, every title whatever, has respect to the lands in which they are exercised. No right can exist without a substance to retain it, and to which it is confined; it would, otherwise, be a right without any existence."

And so in *Keene v. Wheatley*, Fed. Case 7644, page 194:

"Inventions, literary compositions, and other primary results of mental development are incapable of any profitable use, independent of actual or potential communication of the knowledge of the results. Actual communications of the knowledge are irrevocable. The original possessor of the knowledge cannot afterwards, by any physical or other process of resumption, deprive others of it, or by any physical means prevent its ulterior communication, or suppress any such diffusion of its fruits as can be directly or secondarily effected through any means which he has once placed at the command of another person. * * * An oral discourse, though studiously prepared and committed to memory, depends for its retention of communication upon a fugitive or evanescent mental impression. Such a result of mental development may be the subject of conventional engagements, express or implied, or of confidential relations, imposing duties cognizable in a court of equity. But it cannot be the subject of proprietary right (3 Law J., ch. 209, imperfectly reported on this point in 1 Hall & T., 28, 33, 35, 38, 39)."

Nothing can be the object of property which is not capable of sole and exclusive enjoyment.

The very word property, drawn from a word which means to seize and to possess, would seem to demonstrate that the idea for which it stands carries with it the principle of exclusiveness, of separate and personal dominion. From the beginning all the writers, both of the common and of the civil law, have derived the primary notion of property from its capability of being appropriated and separated from the mass and held in the enjoyment and dominion of one alone. Unless the object is capable of being exclusively possessed and enjoyed, it cannot be said to be property. To call that thing property over which an original and exclusive and continuous dominion may not be exercised is a contradiction in terms.

Says Mr. Justice Yates in the case of *Millar v. Taylor, ubi supra* (p. 2362):

"Here the maxim occurs which I mentioned before, that nothing can be an object of property, which is not capable of a sole and exclusive enjoyment. For, property, as Pufendorf observes, implies a right of excluding others from it. For, without that power, the right will be insignificant; it will be in vain to contend that 'that is your own,' which you cannot prevent others from sharing in."

"With regard to books," says Mr. Justice Yates (p. 2365), "the very matter and contents of the books are, by the author's publication of them, irrevocably given to the public; they become common; all the sentiments contained therein rendered universally common; and when the sentiments are made common by the author's own act, every use of those sentiments must be equally common.

"To talk of restraining this gift, by any mental reservation of the author, or any bargain he may make with his bookseller, seems to me quite chimerical.

"It is by legal action that other men must judge and direct their conduct; and if such actions plainly import the work being made common, much more if it be a necessary consequence of the act, 'that the work is actually thrown open by it,' no private transaction or secretly reserved claim of the author can ever control that necessary consequence. Individuals have no power (whatever they may wish or intend) to alter the fixed constitution of things; a man can't retain what he parts with. If the author will voluntarily let the bird fly, his property is gone; and it will be in vain for him to say 'he meant to retain' what is absolutely flown and gone."

Applying these general suggestions to the case in hand: First, as these quotations are made, they are necessarily public. They are published first to the brokers engaging in the transactions upon the board, and, second, to their principals for whom they are dealing; and the information thus given by these agencies may freely be transmitted in turn *ad infinitum*. So publicity of these quotations is inseparable from their creation.

In *Keene v. Wheatley*, Fed. Cas. 7644, property is defined as follows (p. 191):

"Proprietorship is a certain or contingent exclusive right of unlimited or limited profitable use of an ascertainable subject."

Chancellor Kent says (2d Com., 320):

"The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself."

In Bouvier's Law Dictionary property is defined as follows:

"An *exclusive* right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without consideration, or even throwing them away."

"One of the valuable incidents of the ownership of land is the right and power of *exclusion*."

Walker v. Old Colony R. R. Co., 103 Mass., 14.

"The term 'personal property,' using the word 'property' with reference to the thing owned and not the right of ownership, embraces at the common law all those things in which one may have a right and interest to the *exclusion* of others."

Shouler's Personal Property, sec. 2.

"Property is the *exclusive* right of possession, enjoyment, and disposal of a thing which is in itself valuable. It is ownership."

Jones v. Van Zandts, Admr., 4 McLean, 603.

Blackstone says (1 Com., 138):

"The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

Webster's definition, undoubtedly drawn from the universal acceptance of the term, is:

"The *exclusive* right of possessing, enjoying and disposing of a thing; ownership."

All of these definitions of property convey the idea of exclusive dominion. Moreover, the universal significance of the word, apart from any technical legal consideration, carries with it this paramount idea of dominion. It is in accordance with the universal notion of mankind and it would be impossible to define property eliminated of this attribute. Incapable of sale; placed without the protection of the law, and held in common with the world at large, it cannot be subject to private ownership.

Nothing can be the object of property that is not capable of distinguishable, proprietary marks.

These quotations are mere figures and words, infinitely repeated. That which persuaded the courts to accord the element of property to literary production was that, although the ideas were common and the words which expressed those ideas were in universal use, nevertheless the arrangement of words and ideas into a particular literary form was such that they might be earmarked and identified. This appears in the opinion of Mr. Justice Erle in the case of *Jefferys v. Boosey, ubi supra,* he, however, arguing with the minority in favor of the view that literary property existed at common law after publication. We cannot better inform the court of the difference between that which is sought to be claimed as property here and literary property than by quoting Mr. Justice Erle's opinion (p. 869):

"With respect to the first of these grounds, that copyright cannot be the subject of property, inasmuch as it is a mental abstraction too evanescent and fleeting to be property, and as it is a claim to ideas which cannot be identified, nor be

sued for in trover or trespass, the answer is, that the claim is not to ideas, but to the order of words, and that this order has a *marked identity and a permanent endurance.* Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words, and no two answers to your lordships' questions will be the same. The order of each man's words is as singular as his countenance, and although if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious, by comparing the words of ancient authors with other works of their day: the vigor of the words is unabated; the other works have mostly perished."

This identification of which Mr. Justice Erle speaks is such as resides in the work itself and needs no extraneous evidence. He urged that it was property, because it was capable of identification and that it was property because it was an arrangement of words that was unique, peculiar, and might be readily recognized and appropriated by its author.

This cogent argument of Mr. Justice Erle was to establish the proposition that because a literary work could be earmarked and identified, therefore it could not be lost by publication, but might be readily reclaimed by its author. In this contention he failed, but if his ingenious and forceful argument was unavailing in the matter of a literary composition, how far must any argument fall short in demonstrating the existence of this element of property in these quotations as they flow from the lips of the traders upon the pit? Bearing in mind that if there be property at all in these quotations, as the counsel for appellee insists, in the mere knowledge of them, that property has its inception at the instant of their announcement, how can such knowledge be identified, earmarked, in the purlieus of the board of trade, inasmuch as it has been created by the united voices of any possible two of the two thousand members or thereabouts

composing the board of trade? It lacks any internal evidence of identification nor can it be identified extraneously.

We therefore conclude this branch of the argument with the assertion that no right of property can be asserted to the knowledge of these quotations as they arise from transactions of members in buying and selling the commodities for the public for whom they are acting. This information is as free as the air or the sunlight, and no more susceptible to private property dominion than those elements.

The board of trade cannot alter the essential nature of these quotations by making record of them in its office. Its sole right of property is necessarily confined to the records themselves.

Having now considered the origin of these quotations and tested them by the elementary principles of property, we can now discuss the nature of any claim of property which might be asserted by the board of trade. The facts are simple. As these quotations arise from dealings of members in the pits memoranda are taken and delivered to various telegraph offices stationed in the hall. The work of gathering these quotations and delivering them to the telegraph companies is that performed by the board of trade pursuant to its contracts with the telegraph companies. Here occurs the first connection of the board of trade with this "knowledge." It is after the transaction is closed, the bid made and accepted, the "quotation" produced and published in the manner we have heretofore pointed out. Indeed, more accurately speaking, it is not the board of trade which gathers these quotations, but it is done by an independent corporation, namely, the Cleveland Telegraph Company, which is engaged in that work under a license from the board of trade to go upon its floors. So far from costing the board of trade any money or labor to perform its contract with the telegraph companies, it appears from the rec-

ord in this case that the work is performed by an independent corporation, and that the board makes a large actual profit from the arrangement with this subsidiary corporation.

In considering the claim of the board of trade one is forcibly reminded of the driftwood story: The story goes that a man, walking along the levee of the Missouri river during the June rise in a western town, when the stream was full of floating logs and timber brought down from the northern forest regions, aroused a lot of sleeping loafers sitting or lying upon the bank, and asked them if they wanted employment, and when they responded in the affirmative, suggested to them that they might take a boat and go out and catch driftwood. To an inquiry as to what they were to get for such work, they received the response that they would be given half they caught.

Bearing in mind that these quotations as they originate have no element of property whatsoever, the application of this little parable is quite apparent.

But granting, as we do, that the work of gathering these quotations is that of the board of trade and one which it may very properly undertake, the question yet remains whether there is here involved a species of alchemy which transmutes that which was before public and free as the air into something which partakes of all the attributes of property, which may be and necessarily is confined and restricted to the dominion and exclusive use of the board of trade. The function of the board of trade is purely that of an historian of public events. In other words, and the distinction cannot be too clearly drawn and impressed, the *object* of property here is not the quotations themselves, not the knowledge of the fluctuating prices of the cereals and provisions sold in the pit, but is in the *record* of them prepared under the direction of the appellee. To this result must all analysis, all application of the cardinal principles of property, lead. These records, and these alone, are corporeal, are visible, are

capable of being distinguished, and are susceptible of sole and exclusive dominion.

Having now cleared the question of the confusion arising from the doubtful and uncertain reference of the appellee in its bill as to the nature and extent of its property right, we may now proceed to more clearly and intelligently understand the issue and the only issue which is presented for the consideration of this court under this head, namely, that the appellants have appropriated appellee's property to their use against the will of the appellee. We may lay aside for the present all questions of public policy; of whether there is property here impressed with a public trust or not. We are now regarding this proposition from the purely private standpoint of the individual whose dominion over his property may be conceded to be absolute and exclusive.

It is not to be overlooked that these reports or memoranda delivered to the telegraph companies are confined to the bald and naked representation in figures of the selling prices. In other words, that which is presented to the telegraph companies is exactly that which is existent in the public mind; nothing more, nothing less. Obviously, the dominion and control of the board of trade over its records, over the only thing which it has created, is in no manner interfered with by the appellants in this case. That which the appellants concede to have obtained and to have availed themselves of is this knowledge, this information, created and public before the board of trade acted upon it at all. To be sure, the appellants may be said to have derived this information through this channel. That we will discuss later. The point which we now wish to impress is that the sole thing which the appellants are charged with using is information which is clearly public. The channel through which they may have acquired it is a totally different matter. It therefore seems to us that at the outset the appellee is met with a fatal objection to its claim of property in these quotations upon the principle that that which has become public and

common cannot thereafter be subject to exclusive, independent, proprietary dominion and control.

The analogy of the copyright law, which, as we have seen, is the most favorable of all analogies to the appellee, refutes this claim of the appellee. The theory is that the author who has created a literary property is vested for a definite period of time with an absolute control over the publication of his work. It is for him to determine when and under what circumstances it shall become public, it shall become common. If he once has exercised this right and permitted it to become public, he cannot thereafter repent his election or revoke his dedication. The same is true of an easement over lands. Granted that the easement once exists, it is beyond the power of the owner of the fee to regain control. Or if the easement was originally restricted and by acquiescence of the one upon whose property this subservience exists the public use has become enlarged, it cannot be recalled.

We have said that each one of these quotations must in and of itself partake of all the elements of property, the truth of which is obvious. Manifestly, each one of these quotations has not only become public within the halls of the board of trade, but has gone beyond the walls of that exchange; has been communicated to the principals for whom the brokers were dealing in the pits, and necessarily has been again communicated to still other individuals, both those who are members of the exchange and those who are not; and this without restriction as to the purpose of such communication. Under what reasonable theory, then, can the recording of these quotations upon the bits of paper reduce such knowledge to the rules of private ownership? Can such act upon the part of the board of trade revoke the previous general publicity already given to this information? Can it put thereby a curb upon the tongue of the broker or of the public at large who have become possessed of it? Can that which is boundless be constrained and put in bounds? Can that

which has become infinite be made finite? As well might one claim a right of property in the air of a room by drawing a portion of it into a bottle and sealing the bottle. The symbolic and tangible representation of the knowledge upon the records of the board of trade must not be confounded with the knowledge itself. It is none the less available to others who may pursue it. The communication of a thought by no means gives to the recipient a monopoly of that thought.

The action of the board of trade in reducing these quotations to writing and then delivering them to the Western Union Telegraph Company unchanged from their original nature and characteristic may be illustrated in the case of a turbine wheel over which water from a public stream is allowed to run. The water from above passes over the wheel to the stream below. It is none the less public below because it has passed through the wheel. It is this essential failure of the creative faculty which differentiates this case from all other claims of literary proprietorship. Take, for example, the case of the Associated Press. There an event public in its nature transpires. The Associated Press does not confine itself to a bald and naked recital of the fact, but brings into play a creative faculty. It is something original; something which did not exist before; a new product which is sent over the wires by the associate editor. There are the ear-marks of private ownership, and the story as told by the Associated Press is as capable of identification as any other literary performance. The celebrated editor Charles A. Dana, whose motto was "Print the news and all the news," held that the influence exerted by a newspaper upon public opinion consisted more in the manner of collating and printing the news than by its editorial utterances.

Suppose that instead of transmitting this information over the lines of a telegraph company the board of trade should verbally inform A that May wheat sold on the board of trade for eighty cents, could it be contended for a moment hat the recipi ent of that information could not give the

widest publicity to it? The circumstance that instead of this being a verbal communication it is in writing to the telegraph company cannot alter the case. These homely illustrations only serve to bring this case and the extent and nature of appellee's claim more forcibly to the attention of this court. It cannot be lost sight of that appellee's claim must of necessity rest on something more solid for its foundation than the mere collection of these quotations upon bits of paper after they have transpired. It must go beyond that and must show a property right attaching at the very inception of the quotations, at the very instant of their creation. This is demonstrated by the claim of damage which is asserted in the bill (p. 6), which we have already quoted, but which we quote in part again:

"For if any telegraph company, or other person, is permitted to promptly acquire said quotations surreptitiously or by theft, and without paying your orator therefor, the telegraph companies contracting with your orator for said quotations and agreeing to pay your orator therefor, will be put to such a disadvantage in competition with such telegraph companies or persons acquiring the same surreptitiously and without paying your orator therefor, as to prevent said contracting telegraph companies from long continuing to purchase said quotations from your orator."

In other words, the board of trade claims a monopoly of the knowledge and information itself. Unless it can support this claim of monopoly its whole case must fall. It can certainly acquire no monopoly in the right to communicate that which is already public property. If it could, then the Associated Press could successfully enjoin any competitor from embarking in a similar business and selling news of current events as they might transpire.

Another principle closely related to the one just discussed and which equally forbids the claim of property asserted by the appellee here is that the copyright is confined to the manuscript or work in the form produced by the owner, and

does not include knowledge, ideas, or suggestions which may be communicated thereby. As Mr. Justice Willes said (p. 2331):

"But the defendant's counsel insist that by the author's sale of printed books the copy necessarily becomes open. In like manner, as by the inventor's communicating a trade, manufacture, or mechanical instrument, the art becomes free to all who have learnt from such communication to exercise it.

"The resemblance holds only in this, as by the communication of invention in trade, manufacture, or machines, men are taught the art or science, they have a right to use it; so all the knowledge which can be acquired from the contents of a book is free for every man's use. If it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem a man learns to make an epic poem of his own, he is at liberty.

"But printing is a trade or manufacture. The types and press are the mechanical instruments; the literary composition is as the material, which is always property. The book conveys knowledge, instruction or entertainment, but multiplying copies in print is quite a distinct thing from all the book communicates. And there is no incongruity to reserve that right, and yet convey the free use of all the book teaches."

This is the most favorable statement of the case for the appellee which can be found anywhere. It is shown by the decision of the Supreme Court of the United States in *Wheaton v. Peters* that the argument is fallacious even as applied to works admittedly involving a creative faculty. As said by the court in the case last cited (p. 657):

"The argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted, and the answer is that he realizes this product by the transfer of his manuscript or in the sale of his works *when first published.*"

Here, without the slightest creative faculty, without exercising any mental effort, the board of trade brings to the

telegraph company a report, showing the prices at which these cereals are selling in the pits. Two things are there presented: First, the physical, corporeal, visible manuscript, upon which this record is written, and second, the knowledge which it contains. Under the most extreme view, the property right is confined to the former. It remains for this case to assert a claim in the latter.

It is a contradiction in terms to insist upon a restricted communication of ideas or knowledge. In the very nature of things it cannot exist. A literary proprietor may very properly restrain the use of his manuscript which he may have loaned a friend or given to another to read. But his right of restriction is confined to the reproduction of the thing itself, not to any knowledge or information that it may contain, which may be freely given the widest publicity. In this case the board of trade has brought that which is a matter of common knowledge to the telegraph companies. It has brought it in the bald and naked form in which it existed before. It at most consists in a simple communication of an already existing public fact, and the contention of the appellants is that under no circumstances, by no contract, by no casuistic reasoning can the appellee rightfully assert a private ownership in that knowledge thus acquired.

Appellee is without power to claim a right of restricted publication. If it publishes it at all, it must be unconditional.

Another objection to the claim of appellee here is that even if this be conceded to be private property, not only as regards the manuscript upon which it may appear, but as regards the information and knowledge itself, nevertheless, is not within the protection asserted by the appellee, for two reasons: First, because under the charter of the board, as construed by the supreme court of Illinois, it may not retain

it to the exclusion of the public, and, second, because under its contract with the telegraph company it is a public dedication, and not a restricted publication.

Upon the first point we have seen that in all of the cases upholding the right of publication they involve an element of election by the owner. The owner may privately publish and distribute to a limited number of friends, or he may refuse to publish altogether or he may publish without restriction. We are here, as we have said, confronted with a case, however, where under the charter of the company it is granted a power to publish and disseminate this knowledge, and it needs no argument to say that the power thus granted in the charter carries with it a duty to duly and publicly exercise it. The language of the grant is as follows:

"To acquire and to disseminate valuable commercial and economic information."

This charter has been construed by the highest court of the State of Illinois in the case of *New York & C. Grain & Stock Exchange v. The Board of Trade of the City of Chicago et al.*, 127 Ill., 153; 19 N. E., 855. That was a suit brought by the New York and Chicago Grain and Stock Exchange, a trading corporation, against the Board of Trade of the City of Chicago and certain telegraph companies, to enjoin the board of trade from refusing to deliver reports of quotations through the telegraph companies to the complainant. Upon final hearing the bill was dismissed, but upon appeal to the upreme court of Illinois it was held as follows. (We quote from the syllabus):

"Though the Chicago Board of Trade is a private corporation, and the business transacted by it daily is of a private nature, yet the board having for many years permitted and invited a telegraph company to transmit during the sessions of the board, to all persons who chose to pay for the information, reports of the dealings of the board, fluctuations in prices, etc., and the information so obtained having in consequence become of essential importance to the

commercial world, such information has become impressed with a public trust, and the board cannot now treat it as purely private, and withhold it from all but a favored few."

Our present argument, however, is apart from the question of these quotations being impressed with a public trust, which we shall argue later; but certainly this clearly decides that if the board of trade undertakes to publish at all, it shall publish unrestrictedly.

Under all of the principles which govern publications of literary property, it seems clear that the effect of the contract between the board of trade and the telegraph company is a public dedication beyond recall of this information. The idea of a private or restricted publication necessarily implies a right of revocation. This holds true as to all manner of limited dedication to the public, either of literary ownership, or of easements of lands, or anything else of a kindred nature. The author who loans his manuscript, or the playwright who invites a definite portion of the public to a private recital, still retains the fullest measure of physical control over his manuscript and over the right to prevent reduplications of the same. Here the claim of appellee extends not only to its manuscript, but to the ideas or knowledge as well. If we grant, for the purpose of the argument, that the claim is tenable, nevertheless, the effect of its contract with the telegraph companies is to put this knowledge beyond its recall. It has voluntarily placed it within the channels of commerce. It cannot revoke it. If it is communicated once, it necessarily must be communicated for all time to come.

The appellee recognizes this inevitable result, but shrewdly seeks to fix the period when it shall be deemed to have lost its control, not by virtue of any subsequent act of relinquishment upon its part, but by mere passage of time. It concedes that it has loosed its hold forever upon this knowledge; has sent it forth into the world. It undertakes to

say, however, that after the lapse of ten minutes, and not before, this information shall become public. In other words, that the essential ingredient of the transmutation from private to public ownership shall be the mere passage of time. By the same token it could prolong its ownership if it so desired, and declare that it should not pass the bounds of control for one hour, because nothing will have occurred within the ten minutes that would not be equally applicable in the argument of a right of ownership for the longer period. This is certainly not what is meant by restricted publication, and the fact that the counsel resorts to the argument simply illustrates the length to which he is driven in supporting this extraordinary demand.

The case is very similar in principle to that of *Ladd v. Oxnard*, 75 Fed., 703. There the plaintiff was claiming a copyright, and it was necessary to establish a general publication. The syllabus sufficiently describes the case:

"The issuance to subscribers, without count as to number, of a book of credit ratings and the financial standing of persons and firms engaged in a particular line of business, upon a stipulation that the same is merely loaned to the subscriber, and not sold, and that, if found in any other hands those entitled to use it by permission of the publishers, the latter may take possession of it, and annul all rights of the subscriber, is a publication, sufficient to give the compilers a right to the protection of the copyright statutes, where they have taken the necessary steps to secure a copyright."

"Evidence showing that plaintiff had sent a number of copies of a work to booksellers and private individuals, for examination, before acquiring a copyright, and had in one instance accepted the purchase money, constitutes a publication within Rev. St. U. S., sec. 4956, which provides that no person shall be entitled to a copyright unless he shall, within ten days from the publication thereof, deliver two printed copies of the book to the Librarian of Congress."

Gottsberger v. Aldine Book Pub. Co., 33 Fed., 381.

In the case of *Keene v. Wheatley*, Fed. Cas. No. 7644, which is probably the most instructive case in the American reports

upon the principles affecting this class of property, a publication is thus defined (p. 198):

"A publication of such a composition is an act which renders its contents, in any mode or degree, an addition to the store of human knowledge. Every communication of a knowledge of such contents, or of any other primary result of mental development, unless confidential, is, more or less, a publication. * * * A land-owner's express or implied concessions, through which an easement is acquired by the public, are, also, a dedication to the public. But, from the differences in the natures of the respective subjects, the two dedications differ in such of their legal effects as depend upon the dedicating proprietor's own definition of his intended purpose. In the case of an easement, his intention, so far as definable from his acts and omissions, always determines the existence of the rights of the public, and ascertains their extent. *City of Boston v. Le Craw*, 17 How., 426; 5 Watts & S., 141–143; Adol. & E., 99; 5 Taunt., 127. Whereever this intention is incapable of taking effect, his dedication is ineffectual, except as a mere license, revocable at his pleasure. 11 Mees. & W., 830; 13 Mees. & W., 838. The existence of the public easement in such a case is thus not less dependent than that of a private easement in all cases, upon the intention of the proprietor of the land in which it is exercisable. But, when a literary proprietor does an act which has the effect of such a dedication, the public may acquire from it rights independent of any optional definition by himself of his intention. The cases in which this may occur are of two classes. Cases of one class are those of 'dedication to a limited part of the public.' Except in the single case of a charitable disposition, unincorporated persons not individually ascertained are legally incapable of acquiring property. That which would otherwise be a dedication to the use of a limited number of unascertained persons must, therefore, either enure to the benefit of the whole public, or take effect as a mere license. The latter is the effect when the existence of an easement is in question. 11 Mees. & W., 830. So, in the case of a charitable disposition incapable of taking effect the former proprietorship continues. But, in the case of literary composition the rule is the reverse. Thus, although the number of a theatrical audience were strictly limited, however small it might be, and however

high the price of admission, yet, if no discrimination were exercised as to the persons admitted, the representation before such an audience would enure to the benefit of the whole public. See 12 Adol. & E. (N. S.), 237. Cases of the other class are those of dedication to the whole public for a limited purpose. The purpose of the dedication of an easement for public use may be limited. 2 Camp. 264, note; 11 Mees. & W., 830. See 5 Taunt., 127. But, here again, the rule as to literary composition is different. When the composition is published without any discrimination as to persons, a restriction of the purpose, or of the extent, of the publication would be futile. Such a restriction cannot prevent ulterior diffusion of the knowledge of the contents by unknown persons. After such diffusion, the publication could not be suppressed without injustice to other persons to whom the knowledge might have been communicated. The restriction being thus, as to the public, a nullity, the effect of the publication is irrevocable and unlimited."

So in the case at bar, this information, according to appellee's averments in its bill, and its contract, is immediately disseminated through tapes or tickers and over the telegraph wires to a large and unascertainable number of the public; it is immediately exposed on the tapes to the view of whomsoever will. The attempted restriction is utterly futile, because, by its own act it has sown this information broadcast.

The appellee has realized the full avails of its property according to its nature when it has sold and delivered the quotations to the telegraph companies.

It is to be presumed, of course, that the telegraph companies will continue to disseminate these quotations. Assuming a tangible right of property in the record of these transactions which embraces the knowledge as well, nevertheless the board can only enjoy its right of property according to its nature and the fixed condition of things. As said by Mr. Justice Yates in *Millar v. Taylor, supra*, p. 2357:

"All property has its proper limit, extent and bounds. Invention or labor, (be they ever so great,) cannot change the nature of things, or establish a right where no private right can possibly exist."

* * * * * * *

(P. 2359:)

"That every man is entitled to the fruits of his own labor, I readily admit, but he can only be entitled to this according to the fixed constitution of things; and subject to the general rights of mankind and the general rules of property. He must not expect that these fruits shall be eternal; that he is to monopolize them to infinity; that every vegetation and increase shall be confined to himself alone, and never revert to the common mass. In that case the injustice would lie on the side of the monopolist who would thus exclude all the rest of mankind from enjoying their natural and social rights."

On page 2360, after discussing the right of the author to dispose of his manuscript, either under the common law or the copyright statute, Mr. Justice Yates further said:

"If an author is permitted to enjoy his property according to the nature of it, he can have no injustice done him; and if his situation is such that he can only dispose of it as other people can of their goods; or if he can only dispose of it for the first publication, can the author murmur because he can dispose of it only as other people can their property? Shall an author's claim continue without bounds of limitation, and forever restrain all the rest of mankind from their natural rights by an endless monopoly?"

Yet, such is the claim that is now being made. The Supreme Court of the United States, in *Wheaton v. Peters*, recognized and answered the claim in substantially the same words which we have already quoted (8 Pet., 657):

"The answer is that he realizes this product by the transfer of his manuscripts or in the sale of his works when first published."

The board of trade, to use a homely phrase, "cannot eat its cake and have it." It cannot sell these quotations for the express purpose of resale and yet claim a restricted publication of them. It is a contradiction in terms to insist that that which it has done in virtue of these contracts can be said to be a restricted publication.

The delivery of these quotations to public agents like the telegraph companies is necessarily a publication to the world.

It is observed that the contract of the board of trade is with public agents which are, in addition, instruments of interstate commerce. Is it not absurd to say that the board of trade may accomplish a restricted publication of this knowledge by employing for the purpose a public agency like the telegraph companies. No matter what conditions it may seek to impose upon these public agencies, no matter how carefully it may classify those who shall receive the information, if it give these quotations to the Western Union Telegraph Company to be transmitted to any number of persons, with the first click of the telegraph instrument they are public; they are gone and can never be recalled. They belong to the sum of human knowledge and may be acquired in any way or from any person by any device and used for any purpose so far as the board of trade is concerned.

The case of *Bryant v. Western Union Telegraph Company*, 17 Fed., 825, has been and doubtless will be again cited by the counsel for appellee in support of the contention that the board has a complete control over the dissemination of these quotations. The principle which was before the court and was decided is obviously correct; namely, that one engaged in bucket-shopping or an illegal business is in no position to invoke a court of equity to compel the furnishing of quotations to him. That was all there was in the case, and anything beyond that is bald dictum of a character which we

submit is not even persuasive argument. Its application to this case is not apparent, because it is the admitted purpose and desire of the board to sell and publish these quotations. The only question is whether, having undertaken to publish this knowledge, it can restrict the publication to the exclusion of legitimate dealers; and, furthermore, whether, even granted its right to restrict the publication, it can accomplish that purpose through a public agency like the telegraph company.

To the case of *Bryant v. Telegraph Company* is appended a very carefully written note by Mr. Adelbert Hamilton, an eminent lawyer of Chicago. We quote from the language of Mr. Hamilton, with the cordial approval which its sound sense plainly deserves:

"Another point may be suggested. A telegraph company is a public corporation, exercising public franchises—*e. g.*, eminent domain—and serving the public in all ways for which it is competent. It is an agent of the public. As a part of its business it collects, in the various cities and places to which its lines run, information of ruling market prices. This information it transmits over its lines, and sells it to such of the public as desire to buy it. Now, when the board of trade admits the reporters and operators of a public agent to its rooms, and allows them to take and transmit quotations of prices, does not the board make a publication of its prices to the public, which entitles the public to use them without restriction? Is not the giving of such prices to an agent of the public a publication of them for the benefit of the public? If it publishes its prices to the world, can it say that certain persons shall not avail themselves of them? The publication is not copyrighted. Can the board restrict the use of published quotations by the public any more than an author who has no copyright can, after publication, restrain the subsequent publication of his work by all who choose to print it?"

It seems clear, then, that even assuming for the purpose of this argument that the board of trade has a complete right of property, both to the original knowledge contained

in the record of these quotations and the records themselves. It is a thing which is essentially incapable of restricted publication through the channel and instrumentality of a public agency like a telegraph company. It is dealing with an acknowledged principal, to wit, the public through an agent of the public. Does not the ordinary rule obtain which imputes to the principal knowledge possessed by the agent? It seems to us that it is utterly irrational to contend that under the circumstances of this case the control and dominion of the board of trade of every kind and character over these quotations has not ceased the instant the quotations are placed in the hands of the telegraph companies.

The distinction between restricted and general publication does not extend to matter of this kind.

We also undertake to say that the rule of restricted as distinguished from a general publication only applies to that character of literary production which comes within the terms of the copyright law. This does not conflict with the rule relating to trade secrets and the like, which obviously has no application to the case at bar. If there is a right of restricted publication here, it must be analogous to that possessed by the author or dramatist or other literary producer and owner.

The Supreme Court of the United States, as we have seen, has held that the copyright act is not the recognition of a property interest already in existence, but is the creation of new rights. Such property right is purely the creature of the statute. Now, if this information which the appellee has gathered is not within the copyright law, we are confronted with this anomalous condition: that these quotations, the product of no invention or peculiar or special labor upon the part of the board of trade, incapable of being earmarked or distinguished, lose none of their character as property by publication, but may be followed and the use restricted into

the hands of whomsoever the information contained therein may come. This results in giving to these quotations a quality of property, a higher protection, a greater sanctity than is permitted to any intellectual or literary production.

It follows, then, that these facts and figures collated upon the board of trade not being copyrightable, all of the analogies to be drawn from the law relating to literary property are inapplicable to the case in hand, so far as the question of publication is concerned. Therefore the dilemma occurs that either they lack all of the elements of property, whether in the air or after they have been recorded and collated by the instrumentalities of the board of trade, or the property right that inheres in them is in nowise lost by publication and they may be forever subject to reclamation and control, which reduces, we insist, the argument and contention of the appellee to an absurdity. In fine, we contend that with respect to every sort of knowledge or information not a trade secret and not subject to be copyrighted there is and can be no element of property whatsoever involving a right of control of publication or reclamation. The first breath of air which gives it to any one gives it to all. This disposes of the claim of a right to prevent us, as it has been expressed in the bill, "surreptitiously" or against the will of the board of trade acquiring this knowledge in any way that we may see fit. Appellants have agreed by stipulation that they are using this knowledge and information, and are acquiring it as rapidly as it may be obtained after it is bruited about on the floor of the board of trade.

The telegraph companies are made nominal parties to this suit. They stand mute. They are not complaining of appellant, nor are they assisting the board of trade in the prosecution of this suit.

Therein this case differs *toto cealo* from the cases which we shall presently consider, cited by appellee's counsel.

Cases and Points of Appellee on the Question of Property Right.

The cases that counsel for appellee cited as analogous in support of the right of property in the court below are of three classes: The one to the effect that the production at a theater of an uncopyrighted and unprotected play is not a publication. *Thompson v. Halleck*, 133 Mass., 32; *Palmer v. De Witt*, 47 N. Y., 532; *Crowe v. Aiken*, 2 Biss., 208, Fed. Cas. No. 3441, are cited under this head. Second, those relating to lectures pronounced from a platform in a public hall, in support of which *Abernathy v. Hutchinson*, 1 Hall. & Tw., 28; *Caird v. Sime*, L. R. (1887), 12 H. L. C., 336; *Bartlette v. Crittenden*, 4 McLain, 300, Fed. Cas. No. 1082, are cited. And as presenting analogies to this rule of law the cases of *Turner v. Robinson*, 10 Irish Chancery, 121, and *Albert v. Strange*, 2 De G., S. & M., 652, are noted.

So far as concerns some of the cases the rule is contrary in the United States.

A public exhibition of a painting in Europe for two months in one public gallery and during the following summer in another, without any notice of copyright, amounts to a general publication.

Pierce & Bushnell Manufacturing Co v. Werckmeister, 18 C. C. A., 431.

With reference to the rule relating to dramatic entertainments and lectures, Judge Putnam, in the case of *Ladd v. Oxnard*, 75 Fed., 731, makes the following comment:

"The determinations of various courts, that, under some circumstances, the delivery of lectures, or the representation of plays, to such of the public as may attend, do not constitute publication, must be regarded as rather of an incidental character, arising undoubtedly to some extent from tenderness for authors, and not establishing any general rule."

We should assume that a soulless corporation of the character of the board of trade could with difficulty invoke a similar spirit of judicial "tenderness."

Assuming the cases cited by appellee all present a sound rule of law, the analogy wholly fails, even from the results of these very decisions. In the first place, because the play and the lecture are the result of individual labor and authorship, for which, as Judge Putnam says, the courts have a tender consideration. The second is that any person who pays to attend a play may freely use all of such play as he can remember in another dramatic representation. The person who attends a lecture may appropriate to himself all of the ideas and thoughts and knowledge and suggestions contained in the lecture; and finally, whatever restriction obtains is to a reproduction of the manuscript in the exact form in which it has been delivered from the stage or the platform. Finally, in the most essential respect they differ because there has been no general publication, but a sedulous attempt at restricted publication, whereas here, as we have seen, these market reports have been given the widest publicity.

The other cases cited in support of the right of property are the following: *Kiernan v. Manhattan Tel. Co.*, 50 How. Pr., 194; *Exchange Tel. Co. v. Gregory*, L. R. (1896), 1 L. Q. B., 147; *Board of Trade v. Thompson Com. Co.*, 103 Fed., 902; *Board of Trade v. Hadden-Krull Co.*, 109 Fed., 705; *Cleveland Tel. Co. v. Stone*, 105 Fed., 794.

Before commenting upon the cases originating in the courts in this country, we desire to call attention to the English case above cited as totally without precedent in the United States and as against the established rule of law here. It appears from the case (p. 155) that the information or price current for which one newspaper had bargained was information which might be, under the copyright law of Great Britain, copyrighted. Therein the case is inapplicable here, because by the decision in *Clayton v. Stone*, Fed. Cas. 2872, such matter is not the subject of copyright in the

United States. This counsel for appellee admitted below, and made that the strong point of his argument that the court should invent some principle of law which should afford the board protection. No rules of property in any true sense are discussed in this case. The action was one for the infringement of copyright. The language is too obscure and general to be of any authority in this contention, based upon original principles.

The American cases cited will be found upon examination to be judgments of courts of first instance, in which the fundamental principles of property have in any of them received the slightest, if any, consideration.

The case of *Kiernan v. Manhattan Tel. Co.* is simply that of a news agency which has at large cost to itself gathered news to be given to particular subscribers who pay for the service, seeking to prevent another news agency selling the fruits of its labor in that behalf, and entering into a rivalry with it among its own customers—a case that is in no sense analogous to this.

But against this case and all related cases above cited we desire to cite the recent case of the *Tribune Company of Chicago v. The Associated Press*, 116 Fed., 126—a decision given by one of the judges who, as we have before said, assumed without argument that the board of trade had a property right in these quotations: Judge Seaman. The case is instructive. The Chicago Tribune Company, by agreement, secured the right to use parts of the special wire dispatches and editorials of the London *Times*, which newspaper under the laws of England might be, and was, copyrighted in England in its entirety. The *Times* abandoned in favor of the *Tribune*, using the language of its contract, "any copyright in these telegrams so far as publication in America is concerned." The selections were made and cabled from the *Times* office and were published in the *Tribune* on the same morning as in the *Times*, though some

hours later. A copy of each issue of the *Tribune* was deposited as a copyright as an entirety.

"Held, that this was not such a copyright of the special matter obtained under the contract, nor such a simultaneous publication as to give the *Tribune* the exclusive right under the statute to publish the same in the United States and that it was not entitled to an injunction to restrain the Associated Press from taking such matter from the columns of the *Times* after its publication in England and furnishing the same by cable to other American papers in which it was published on the same morning as in the *Tribune*."

The court says in the body of its opinion (p. 127):

"The questions thus raised are important and novel, involving on the one hand the rights of the *Tribune* Company to the fruits of its enterprise and expenditure under its contract arrangement with the *Times*, and, on the other hand, the rights of the public to news matter thus published in the leading English newspaper. Solution of the inquiry depends upon a construction of the copyright statutes of the United States, *and not upon the common-law rights of literary property* beyond their consideration in construing the statute. Literary property is protected at common law to the extent only of possession and use of the manuscript and its first publication by the owner, a right well exemplified in *Publishing Co. v. Monroe*, 19 C. C. A., 429; 73 Fed., 195; 38 U. S. App., 410. With voluntary publication the exclusive right is determined at common law, and the statutory copyright is the sole dependence of the author or owner for a monopoly in the future publication. Unless the United States statute is applicable to protect the *Tribune's* publication in question, it is clear that the motion for an injunction must fail."

It would be difficult to see how any claim of restricted publication could be made applicable to a price current or financial news as it is described in the Kiernan case, and not sustained in favor of the *Tribune*. The *Times* publication was protected in London by copyright. It released from that copyright certain portions of its paper. It could not be reproduced in England without the consent of the

Times. It released it restrictedly to the *Tribune* only and the *Tribune* paid a price for it as if for a manuscript, and it was then sent as an unpublished manuscript to the United States. If the interests of the public, as suggested by Mr. Judge Seaman, were of higher consideration than the interests of the *Tribune* in that case, we do not see why they should not be in the case at bar.

This last decision, which we submit is irreconcilable with Judge Seaman's prior decision in the board of trade case in 109 Federal, suggests at least this commentary: That these authorities are only available in so far as they present persuasive argument to this court. Singly or in gross they do not furnish a mass of precedent of any value to the determination of this case. There having been no consideration of this very important question by any court of last resort in the United States, the board of trade is in a poor position to invoke the doctrine of *stare decisis* from *nisi prius* decisions. But if *nisi prius* decisions are to be considered at all, as having any weight as authority, we desire to put against those that are cited by appellee's counsel the decision of Judge Tuley, from which copious extracts are made in the note by Mr. Adelbert Hamilton to the Bryant case, *ubi supra*.

In conclusion upon this question of property, we cannot too strongly urge upon the court that it is not a thing to be merely assumed. Appellee's counsel admits that the right that it asserts and asks to have protected is not within the terms of the copyright law, nor is it covered by the principles of the common law. It seems to us that this is a practical confession of the inconsistency of the thing which he contends for. He must maintain his right, if at all, not upon the notions of *nisi prius* judges that some abstract rule of right or justice will be subserved by granting a right of property in these quotations to the board of trade, or that a moral reformation will be forwarded, which seems to be the moving influence governing Judge Blodgett's decision

in the Bryant case. If the board of trade has this right at all, it must be ultimately referable to some well-settled principle of the common law; some just and rational analogy not only persuasive but coercive upon this court. This court has no right to legislate in behalf of the board of trade and declare that to be a right which all the guiding principles of the common law deny.

II.

Assuming a right of property in the board to these quotations, they have from long, free, and unrestrained usage become a matter of general commercial necessity and have become impressed with a public interest and use. The board of trade is estopped from discriminating with reference to such public use.

As heretofore noted, the supreme court of the State of Illinois, the State in which the board of trade was created and by the laws of which it exists and operates, has held that by long use by the public under the permission of the board of trade to telegraph companies to freely disseminate these quotations, the same have become impressed with a public use or trust, and that so long as the board of trade either disseminates or permits the same to be disseminated it must deal with the public in this behalf freely and without discrimination.

New York, etc., Exch. v. Board of Trade, 127 Ill., 153; 19 N. E., 855.

In *American Live Stock Commission Co. v. Chicago Live Stock Exch.*, 143 Ill., 239; 32 N. E., 282, the supreme court again recognized and confirmed this public duty of the board of trade under its charter, and again declared to the same effect in *Board of Trade v. Central Stock & Grain Ex-*

change, 196 Ill., 396; 63 N. E., 740, 744. This must, therefore, be accepted as the settled opinion of that court.

Counsel for appellee asserts that these decisions are not controlling authority upon this court; that they merely enunciate a principle of general law, upon which the Federal courts reserve an independent right of judgment. No argument in support of this contention was presented in the court below nor any authorities cited which, fairly considered, support it. For the purpose of our argument it is not necessary for us to be tenacious upon this point, but we cannot forbear directing the court's attention to it in passing.

The creation of these quotations and their dissemination are pursuant to the powers that were conferred upon this corporation by the State of Illinois. It follows that any assertion of right flowing from the exercise of such powers must be referable to this grant. Assuming for the purpose of the argument the property right in the board of trade, it can only claim such right as an incident of the powers granted by the legislature of the State of Illinois. It needs no argument to differentiate a case of this sort from *Burgess v. Seligman*, 107 U. S., 20, or *Olcott v. Supervisors*, 16 Wall., 678. In defining and limiting the powers granted under a State charter, the decisions of the State court of last resort are not merely persuasive, but coercive upon the Federal courts.

Sioux City, etc., R. R. Co. v. N. A. Trust Co., 173 U. S., 99, 107, and cases cited.

San Diego, etc., Co. v. Souther, 32 C. C. A., 548; 90 Fed., 164, and cases cited.

The only exception to this rule that can be conceived is when the rights of third parties have accrued under a common interpretation of such powers before such judicial decision has been made.

But the argument which we are about to make is not limited to the rule of decision by the supreme court of Illi-

nois except in so far as it is in line of general authority. It is asserted by appellee's counsel that the *creation* as well as declaration of a public interest in the business dealings of a private person or corporation with the public is an exclusively legislative function; that the courts are powerless to declare the fact, and to judicially act upon it, except in pursuance of a legislative declaration and regulation. Indeed, he goes further and asserts that even the legislature could not impress these quotations with a public use by a legislative enactment. We quote from the brief filed with the court below as follows (p. 54):

"We do not here overlook the fact that the duty to serve all alike has, as respects certain classes of persons, as, for instance, common carriers, been derived from the common law, and not from legislative act. We do, however, contend, that there was no common law imposing upon the Chicago Board of Trade any duty respecting these quotations or in any way restricting its absolute property right therein, and that in the absence of such common law, such restriction must come from the legislature, and any such restriction by the courts is depriving the board of trade of its property without 'due process of law.' We also contend that even the legislature could not stamp these quotations with a public use; but it does not, especially in view of the length of this brief, seem necessary to discuss that here. Hence the Federal rule as to these quotations is correct, and any restrictions on their sale is illegal."

The court will note the seeming inconsistency in this statement that the legislature is powerless to declare any of the business of the board of trade to be impressed with a public use. This would seem to go to the extent of asserting that the facts contained in the bill and the admission of the record do not involve the necessary public interest to impress such business with a public use. If the language of counsel means anything at all, it must mean that the proposition involves an element of *fact* determinable from the nature of the business itself; that this *fact* must exist as a

necessary condition precedent to action of any department of government, whether legislative or judicial. We are entirely content to accept this as the test for determining the existence of a public use.

There are certain principles applicable to a just conclusion of the question and which are to be gathered from the books. We have formulated them as follows:

Any business, whether carried on by a quasi-public corporation, a private corporation, or an individual in his own right, becomes impressed with a public trust when so used "as to make it of public consequence and affect the community at large."

Second. Whether any private property or business has become so affected is a judicial question in all cases, and must be ultimately determined by the courts.

Third. The fact must exist that such property or business has become thus affected, and the courts are the exclusive arbiters of the existence of such fact.

Fourth. The legislature has no power to primarily or finally determine that a property or business is impressed with a public use, and is therefore subject to legislative regulation. The question of the rightfulness of the legislative determination in that behalf is at all times referable to judicial decision, and the courts must finally pass upon it. Any attempt on the part of the legislature to impress property or business which lacks the necessary element of public necessity and use with a public trust is absolutely null and void.

Fifth. The facts which impress a business with a public trust and the correlative duties and obligations on the part of the owner of such business or property in his dealings with the public are governed by the principles of the common law, and the duties and obligations of the public which ensue may be enforced by the courts in the absence of legislative enactment.

The fundamental reason for judicial interposition has no reference to the kind of business—as, for example, whether it be a grist mill, a wharf, or a railroad or a public conveyance. It applies to any business so related to public use or necessity, for the sole purpose of preventing a monopoly and the oppressions and wrongs to the public thereby resulting. We shall presently analyze the business of the board of trade with reference to these quotations and the interests of the public therein, but content ourselves at this stage of our argument in asserting that, tried by the tests of these principles, the board of trade is subject to judicial control in its dealings with the public or any portion thereof. It may not discriminate as to the terms and conditions upon which these quotations will be supplied or restrict their use to particular individuals or impose unreasonable conditions and restrictions in their free enjoyment by the public.

The rule relating to the rights of the public in a business that has become impressed with a public trust is general in its application and affects all property and business in which the public may acquire such interest.

The rule as stated in *Munn v. Illinois*, 94 U. S., 126, is of universal application and stands to be applied to any property or business that may be found within its just application at any time. There has been no clearer statement of this

rule than was made by Mr. Chief Justice Waite in that opinion, and for the convenience of the court we put it here:

"*Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.* When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control."

Munn v. Illinois and related cases involve no new doctrine. They are but expositions of known principles of common law, which have never failed or become obsolete in their enforcement applied to the complicated and novel conditions of modern life. This is made clear by the case itself, which draws its illustrations and precedents for the most part from old cases in England and in this country.

At common law the institution of a market was deemed a matter of such universal concern to the commonwealth that no person could lawfully hold a market unless it were by grant from the king, or by prescription which supposes such grant, and if any person set up a market without such authority, a *quo warranto* would lie against him.

Bacon's Abridgment, "Fairs and Markets."
12 Petersd. Abr., 553, note.

Every person had of common right the liberty of going into the market for the purpose of buying and selling.

Mayor, etc., v. Ward, 2 Strange, 1238.

The public nature of a hotel, which is but a modern name for an inn or a public house, is so well known that it does not need authority.

In *Bolt v. Stennett*, 8 T. R., 606, the court refers to what Lord Hale said in his treatise *De Portibus Maris*, as follows:

"If the king or the subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods, as for the purpose, because they are the wharves only licensed by the king, according to the statute I Eliz., c. 11, or because there is no other wharf in that port, as it may fall out where a wharf is newly erected, in those cases there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc. Neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now, the wharf and crane are affected with a public interest, and they cease to be *juris privati* only. As, if a man set out a street in new building on his own land; it is now no longer barely private interest, but it is affected with a public interest."

In *Allnut v. Inglis*, 12 East's T. R., 527, the principle was enunciated that:

"Where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit."

In *Sandford v. Catawissa R. R. Co.*, 12 Harris, 378, 380, the supreme court of Pennsylvania said:

"The special stipulations inserted in charters for the purpose of securing these rights are placed there in abundance of caution and affirm nothing more than the common right to equality which should exist independently of such provision. * * * The supposed necessity for such provisions in charters granted in this country and in England prove nothing more than that the law-makers in both countries were aware of the difficulty in holding large corporations to those common obligations of justice which individuals feel bound to acknowledge without legislative enactment."

"The charter of the defendants authorized them from time to time to charge, demand and receive such rates or tolls for compensation for the use of their road and motive power and the transportation of passengers, merchandise and com-

modities as to the president and directors shall seem reasonable, not exceeding the maximum prescribed. There is no expressed stipulation that the rates and charges shall be equal to all who may offer goods for transportation over the road. Such stipulations are common in English railway charters and they are found in some charters of railway companies in this country. They are, however, but declaratory of what the common law is. It was so said in *Sandford v. Catawissa R. R. Co.*, 12 Harris, 378, and there is certainly good reason for denying such companies the power to discriminate between persons offering goods for transportation. It seems to be implied in the power given them to establish reasonable rates that the rates must be fixed equally and impartially."

Shipper v. Pa. R. R. Co., 47 Pa. St., 338.

Speaking of the statute requiring railroads to take and transport passengers and property, the supreme court of Texas, in *Houston & Texas C. Rwy. Co. v. Smith*, 63 Tex., 326, says:

"A general duty is here imposed upon railroad companies to furnish sufficient accommodations for transportation of all property that may be offered. This is, however, but declaratory of the common-law liability of carriers. Aside from these statutory provisions, it would be the duty of the carrier to provide all necessary facilities and means of transportation of such property as might be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line. * * * In the exercise of the duties which relate to the public, these companies must, upon general principles, deal alike with all customers."

"Wharves, docks, piers, quays and landing places, may be either public or private, according to the use to which they are devoted, although the property may be owned by private persons. Private property, if devoted to a use in which the public have an interest, becomes public and subject to public control."

Chicago Dock Co. v. Garrity, 115 Ill., 155.

"The main contention of appellant is that its wharf is a private wharf, and under the control of the owner, and that

it has a right to determine for itself with whom it will do business; and counsel confidently cites section 2136, 1 Hill's Code, in support of this position. That section is as follows: 'Any person owning land adjoining any navigable waters or water-course, within, or bordering upon this State, may erect upon his own land any wharf or wharves, and may extend them so far into said waters or water-courses as the convenience of shipping may require; and he may charge for wharfage such rates as shall be reasonable; provided, that he shall at all times leave sufficient room in the channel for the ordinary purposes of navigation.' The first part of this section confers a license upon the owner of lands adjoining navigable waters to extend any wharf erected upon his own land into said waters, but the latter part of the section, viz., that 'he may charge for wharfage such rates as shall be reasonable,' is a limitation merely. The section, as a whole, while it recognizes the right of private ownership in wharves, cannot be construed to mean that such private property may not be devoted to such use as will, in contemplation of law, make it partake of the nature of a public wharf. Upon this question it was said by the Supreme Court of the United States in *Dutton v. Strong*, 1 Black. 32, that 'Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case of dispute, upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' In *Gould, Waters*, sec. 119, the author lays down the proposition, and supports it by a great array of authorities, that 'when wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest, and the wharfage must be reasonable.' The proof in this case shows that numerous steamers landed at appellant's wharf daily, discharging passengers and baggage, as well as freight, from different ports in the waters of Puget sound and else-

where; and it also shows that the appellant receives the sum of 25 cents per ton for every ton of freight going out or coming in over said wharf. We think that the language of the court in *Munn v. Illinois*, 94 U. S., 113, is applicable here, viz., that appellant stands 'in the very gateway of commerce, and takes toll from all who pass.' *In re* The Kate Tremaine, 5 Ben., 62, Fed. Cas. No. 7622, it is said: 'A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters. * * * Every vessel has a license to use, for her safety or convenience, any public wharf on navigable waters, upon paying reasonable wharfage.' We think that, in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted, rather than its private ownership, and that upon the facts found the position of the appellant cannot be maintained. As well might the proprietor of a stage coach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies, which it is not the policy of our law to favor. The decree will be affirmed."

Barrington v. Commercial Dock Co., 45 Pac. 749; 15 Wash., 175.

One of the best reasoned cases is that of *State ex rel. Payne v. Kinloch Tel. Co.*, 67 S. W., 684, decided by the court of appeals of Missouri. We quote from the opinion in that case:

"In the cases above named, the duty of an incorporated company operating a telephone system in a certain locality to treat all citizens of that locality alike, and to give them all equal privileges in regard to the use of the system by entering into contracts with them and installing instruments on their premises, is recognized and upheld, as well as the power of the courts to compel the observance of this duty by a writ of mandamus. Some of the decisions are founded on statutes more or less positively prescribing the duty, and others on the common-law rule that a common carrier, or other company or person holding itself out as ready to serve the public at large in

some business intimately and essentially associated with the general social and business life of the community (especially if such person or company is operating under or enjoys some advantage or franchise from the State,) is bound to serve every member of the community without discrimination or partiality; and some of the decisions which are supported by a statute declare the power to enforce the obligation would exist, if there was no statute, by virtue of the principles of the common law, of which the statute is said to be declaratory (*Telephone Co. v. Bradbury*, 106 Ind., 1; 5 N. E., 721). The duty thus imposed on telephone companies is in no sense novel, nor did its application to them involve a new principle; for their business plainly falls, by its very nature, within the class of quasi-public employments, as to which the courts have never hesitated to restrict in some measure the right of contract for the common welfare and upon considerations of public policy. Telegraph and telephone companies are regarded by the courts as performing functions similar to those of railway, steamboat, and express companies, which conduct a general carrying business, and have always been subject to governmental supervision and regulation exercised both by legislation and judicial decisions (*Vincent v. Railroad Co.*, 49 Ill., 33; *Buffalo E. S. R. Co. v. Buffalo St. R. Co.*, 111 N. Y., 132; 19 N. E., 63; 2 L. R. A., 284). Indeed, the same abridgement of the right of contract is applied to other persons or corporations than carriers, if engaged in employments of a public character, such as inn-keepers, warehousemen, mills, bakers, gas and water companies, and perhaps still others (*Munn v. Illinois*, 94 U. S., 113; 24 L. Ed., 77; *People v. Budd*, 117 N. Y., 1; 22 N. E., 670, 682; 5 L. R. A., 559; 15 Am. St. Rep., 460; *Budd v. New York*, 143 U. S., 517; 12 Sup. Ct., 468; 36 L. Ed., 247; *American Waterworks Co. v. State*, 46 Neb., 194; 64 N. W., 711; 30 L. R. A., 447; 50 Am. St. Rep., 610; *Smith v. Telegraph Co.*, 42 Hun., 454; *State v. Joplin Waterworks*, 52 Mo. App., 312; *Shepard v. Gaslight Co.*, 6 Wis., 539; 70 Am. Dec., 479; *People v. Manhattan Gaslight Co.*, 45 Barb., 137; *Waterworks v. Schottler*, 110 U. S., 347; 4 Sup. Ct., 48; 28 L. Ed., 173; *Brass v. North Dakota*, 153 U. S., 391; 14 Sup. Ct., 857; 38 L. Ed., 757; *Mayor, etc., v. Yuille*, 3 Ala., 137; 36 Am. Dec., 441. Most of such cases deal with the constitutionality of statutes passed to regulate and control the conduct of certain employments; others were interferences by the courts

by writs of injunction or mandamus. It is impossible to extract from them any one principle which will explain and support all the decisions in which the circumstances were held to warrant a restraint on a defendant's right to conduct his business as he pleased, or every one in which they were held insufficient and relief was denied. Ponderous reflections on the opposed political theories of liberty and paternalism, with which they abound, serve too often only to disclose the intellectual bias of the judge who wrote the opinion, while constructions of constitutional powers and limitations have produced haphazard and contradictory results, depending more on whether the deciding tribunal deemed the regulating statute reasonable and wholesome or meddlesome and mischievous than on its clear violation of a constitutional inhibition. In fact, our fundamental principles are not threatened or questioned in any of these curtailments by courts or legislatures of unhampered individual action, because they are made to subserve, rather than destroy, free contractual rights, since they commonly are directed against extortionate or arbitrary conduct by persons, corporations, or combinations either possessing or thought to possess some monopoly or other advantage enabling them to dictate terms. That is the motive of enactments and the reason of decisions of this character, and the vital question seems to be always, whether any particular interference is justified by the existence of a condition which precludes the members of a community from negotiating for fair terms, or forces them to dispense altogether with the service rendered by the party complained of (although their welfare imperatively requires that service), unless relieved by the interposition of the public authorities. Abuses of the contract right must now and then be corrected, and they will require correction more frequently as population grows dense and commercial activities multiply.

"The right to interfere by statute or judgment is placed on several grounds: First, the bestowal by the State of some extraordinary franchise or attribute, under which the party to be restrained is operating,—as in the case of railway and other companies enjoying the right of eminent domain; second, the possession of a legal monopoly, either directly granted by the State or developed from a privilege granted by it,—like licensed State lotteries and railway pools; third, possession of a virtual monopoly on account of the nature

of the business,—like the warehouses whose charges were held to be subject to regulation by government in *People v. Budd, supra;* or, fourth, simply because the business is one which closely concerns the public welfare,—like inns or grain elevators, as in *Brass v. North Dakota, supra.* An examination of the decisions shows that the right to curtail the freedom of contract by compulsory measures on the part of the sovereignty through any of its branches is not exclusively nor always exercised in either of those instances, neither where the party restrained is the donee of a valuable franchise, nor where a monopoly, legal or actual, exists, nor where the party against whom relief is invoked operates a business of great magnitude, and heavily influencing the prosperity of the community,—yet at the same time has been exercised in all such cases. In other words, the ground of this public interference with business affairs is not well settled; but the underlying principle is the right of the people, acting through their legislative representatives or their courts, for the good of the Commonwealth, to set bounds to the arbitrary conduct of a natural or corporate person or combinations of either, whenever that conduct becomes intolerably oppressive and mischievous; while at the same time conceding to everybody the prerogative to make such contracts and enter into relations with persons as he chooses inside those bounds."

Without quoting at length and needlessly encumbering our brief from other authorities, we will append a citation of them and invite their careful consideration by the court. It is to be observed that they repeat over and over again the language of the Supreme Court in *Munn v. Illinois*, as defining the origin and source of power, whether exercised by legislatures or courts, in the control and regulation of corporations or individuals devoting their property to a public use:

State ex rel. v. Gas Co., 34 Ohio St., 572, 578.
Lindsey v. Anniston, 104 Ala., 261; 16 So., 545.
People v. King, 110 N. Y., 418, 428.
Rushville v. Rushville Gas. Co., 132 Ind., 575; 28 N. E., 853.

Zanesville v. Zanesville Gaslight Co., 47 Ohio St., 1; 23 N. E., 55.
White v. Canal Co., 22 Colo., 198; 43 Pac., 1028, 1030.
Spring Valley Waterworks v. Schottler, 110 U. S., 347, 354.
Louisville, E. & St. L. Consolidated R. Co. v. Wilson, 18 L. R. A., 105; 132 Ind., 517; 32 N. E., 311; 18 L. R. A., 105.

The circumstance that the business is a virtual or natural monopoly is given peculiar significance in some of the decisions:

State v. Edwards, 86 Maine, 105; 29 Atl., 948.
State v. Loomis, 115 Mo., 307; 22 S. W., 356.

Many of these authorities are gathered together and excerpted from in that very valuable compilation called "Rose's Notes to the United States Supreme Court Reports," in his note to the decision in the case of *Munn v. Illinois*. The learned author of that work, after citing these cases, has made a guarded and careful statement of the principles to be deduced therefrom. Its very caution and moderation commend it to the approval of the court. As fairly but cautiously stating the deduction to be drawn from this mass of judicial decisions, we herewith append it:

"It may be observed in conclusion, that the question whether a business has been rendered subject to public regulation because affected with a public interest, is ultimately, at least, a judicial question for the courts to decide. In a sense, it is a question of fact, since the decision of each particular business or employment must always depend upon its nature and the circumstances under which it is conducted. But this does not mean that precedents would count for naught. On the contrary a slavish adherence to precedents in so delicate a matter is rather to be expected; and it would doubtless weigh heavily against declaring a particular business to be affected with a public interest that it had never in all the history of the law been so declared. If it be urged in criticism that the judicial discretion con-

templated by this principle vests too much power in the courts, since the discretion of a judge is said to be 'the law of tyrants,' the answer is that the same criticism may be applied to the principle upon which courts are wont to determine the propriety of all other regulations imposed under the authority of the police power. And just as the propriety of other police regulations rests upon ultimate necessity, the power of the State to 'govern men and things,' so it may be said that the Munn doctrine rests upon this same consideration of public necessity, and is to be applied subject to the wise restriction that it is, so to speak, 'for use in case of emergency only.'"

The learned counsel for appellee seems to regard the common law as confined to the subjects upon which it operates, without reference to the principles which it declares, and seeks to limit it to the things of ancient origin and to confine judicial supervision of the rights of the public to instances which may be found in the year books and such volumes of reports as were published before the formation of this Government. His averment that "there was no common law imposing upon the Chicago Board of Trade any duty respecting these quotations, or in any way restricting its absolute property right therein," if it have any meaning at all, must mean that there is no ancient decision classifying the board of trade with reference to its quotations with wharfingers, stage coachmen, warehousemen, and innkeepers. This was the very contention in *Munn v. Illinois*, that elevators situated as these elevators were, as Chief Justice Waite said, "in the very gateway of commerce," had nothing whatever to do with the transportation of commodities between the States, and therefore were not subject to regulation, assuming thereby that the power of regulation at common law had no application whatever to them. The burden of the Chief Justice's argument is to show in contravention that they are subject to the rule of the common law, and of necessity that the rule of the common law applies to them without reference to legislation. If they are not within the terms of the common law,

as we shall presently see, the legislation would be absolutely void.

In considering this very question, the learned presiding justice of this court, sitting as a circuit judge, clearly elucidated this rule in the case of *State of Missouri ex rel. Baltimore & Ohio Telegraph Co. v. The Bell Telephone Co.*, 23 Fed., 539. The suit was one to compel the Bell Telephone Company of Missouri to afford the same telephonic privileges to the Baltimore & Ohio Telegraph Company that it did to the Western Union Telegraph Company. The company set up in opposition to the demand that it was the licensee of the American Bell Telephone Company, a Massachusetts corporation, in the use of the telephone in its business, and by the terms of such license it was not permitted to establish telephonic connection with any telegraph company other than one which should be permitted by the licenser, the holder of the patent, the Massachusetts company; that such licenser had permitted telephonic communication to be established with the Western Union Telegraph Company alone.

The points of analogy between that case and the one before the court here are too apparent to need elaboration. The question as stated by the court was whether the court could compel the defendant, doing the telephonic business of St. Louis, to establish communication with any other individual or company than that permitted by its license from the patentee. In answer, Judge Brewer said (p. 540):

"I believe fully in the sacredness of property; but I think all property stands upon an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such. Starting from that as a basis, while every property-owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I perhaps may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws

which control commercial transactions; just as in the warehouse cases (*Munn v. State of Illinois*, decided by the Supreme Court of the United States, and reported in 94 U. S. 113), in which that court held that when an individual built a warehouse, and put his property into that kind of business, he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public, through the legislature, to regulate rates. No man holding property was bound to build a warehouse, or bound to put his property into that particular channel, but the moment he did so, he put it where the legislature could say 'You may charge so much, and no more, for the transaction of this business.' He put his property into the channels of commerce,—as multitudes are doing,—into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into those channels, it is put within the power of the public, speaking through its legislature, *or the power of the court enunciating general rules operative upon such transactions, to modify leases, modify licenses, control duties.* So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St. Louis, with telephonic communication with only certain prescribed telegraph systems, the moment it permittod the establishment of a telephonic system here, that moment it put such telephonic system within the control of the State of Missouri, and the control of the courts, enforcing the obligations of a common carrier.

"The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service."

Although the court stated that this case would be finally settled in the Supreme Court of the United States, assuming that it would be appealed, we have been unable to find any record of appeal. It is to be presumed, then, that the American Bell Telephone Company of Massachusetts, acting through its licensee, was content to accept the decision of Judge Brewer as a just exposition of the law.

In the case of *Cotting v. The Kansas City Stock Yards Co.* 183 U. S., 79, the question was whether persons engaging in the business of yarding and feeding stock at a particular point, preparatory to and incident to their marketing and sale, were engaged in a business that was so impressed with a public use that the legislature had the power to regulate the prices for feed and care of the cattle thus yarded. It may be said that this, as is true of a majority of the cases, is one arising from a denial of the validity, upon constitutional principles or otherwise, of legislative regulations of property which has by the volition of its owners become impressed with a public use; but it does not thereby appear that the judicial exercise of power with reference to property thus impressed is confined to a consideration of the validity of legislative regulations. On the contrary, in the case of *Cotting v. Kansas City Stock Yards Co.* several of the cases which we have already cited, where judicial action was not predicated upon precedent legislative regulation, but was original and exclusive in the court making the decision, are indiscriminately cited as authority for the principle; so it seems to be apparent upon the face of things, at least, that that court takes it for granted that the public control referred to in the rule is a control that may be exercised by any of the departments of government within the ordinary purview of their respective authority. In fine, the test in the end is the use to which the property is put, and not whether some coordinate department of government has acted with reference to the result flowing from such use.

We recognize the clear distinction between legislative and judicial powers. We are not asserting a right in the courts to prescribe permanent regulations concerning property, even though impressed with a public use—as, for example, tariffs and tolls to be charged by common carriers. This has always been held to be and is a legislative function. But no question of that character is involved here. The question at issue relates to the rights of the parties before

the court to the use of property said to be impressed with a public trust. The appellee is seeking the aid of a court of equity to further and secure a monopoly in that property which the appellants contend is a matter of urgent public necessity and which has become impressed with a public use. The court necessarily is compelled to determine this *fact*. If the appellants' contention as to the character of the property be correct, it is certainly within the narrowest limitation of power for the court to *enforce the duty which arises from that fact*. The court does not create the duty; it flows from the fact. It is obvious, then, that the function of the court is strictly judicial, whether it is administering a positive enactment found in a legislative statute or a principle obtaining at the common law.

The legislature is without power to create a public use by legislative declaration, or to finally determine by the exercise of power of regulation, or otherwise, that property is so impressed.

As we have repeatedly urged in this argument, whether property is to be treated as impressed with a public use is in all instances referable to its nature and to the use which the owner makes of it, and is in every instance a judicial and not a legislative question. This is made clear by the numerous cases where the legislature has sought to impose a public user and to affect with legislative regulation certain private property and business. The validity of these regulations and legislative burdens, not alone as to questions of tariffs or matters quasi or purely public in their nature, but as to the question of whether the property might be thus impressed and regulated, has been uniformly submitted to the courts, and the courts have assumed complete power and authority to pass upon such questions. A leading case in this connection is that of *Loan Association v. Topeka*, 20 Wall., 655, 665, 660, 661. In that case it became necessary for the

court to decide whether the business which the legislature authorized municipalities to aid by voting bonds was of a public nature or use which would warrant such aid, or whether it was a purely private business. It was upon this point that the decision went, the court holding that the King Bridge Company, which was aided by these bonds, was a private enterprise and not a public use in any respect and therefore the legislature had exceeded its powers.

The supreme court of Kansas has recognized the same doctrine many times. See *City of Geneseo v. Gas Co.*, 55 Kan., 358; *C. B. U. P. R. R. Co. v. Smith*, 23 Kan., 745, and cases which they cite.

Tried by these principles, these quotations have, from long, free, and unrestrained usage, become a matter of general commercial necessity and have become impressed with a public interest and use.

For the purpose of this argument we shall concede a right of property in the board of trade in these quotations, a right which we believe does not exist. It becomes important, therefore, under the application of the principles which we have adverted to, to consider the extent and nature and the interest of the public in these quotations. Upon this question the facts are undisputed; they are pleaded in the bill, and they are a matter of public history of which the courts will doubtless take cognizance without proof. The bill recites (p. 5):

"And the knowledge of the prices thus made on said transactions during said market hours upon said exchange have become a species of property of such large value to your orator that telegraph companies are willing to pay your orator large sums of money for the privilege of receiving instantaneously said quotations and selling the same to their customers, and many persons throughout the United States who are engaged in the grain and provision business are

willing to pay, and for many years have paid, said telegraph companies large sums of money therefor."

The testimony shows and the bill admits that these quotations were furnished continuously and indiscriminately to the public for many years without any effort upon the part of the board of trade to restrict their use. This was not an accident, but resulted from the deliberate purpose of the board of trade to so foster and permit dealings in these commodities and the use of these quotations as to make the board an influence and power in the mercantile world, and thereby to enhance the business of the brokers who are members of the board. It has succeeded in this probably beyond what were its own expectations. The result is that the miller in the country town cannot buy his wheat to grind in his mill, nor the farmer sell it, without knowing what the ruling prices are for the cereal upon the board of trade in Chicago at the time of the transaction. This is equally true with reference to every commodity which is dealt in by the board. This results not from any legislative fiat nor from any judicial pronouncement. It is a condition flowing from the laws of trade. A legislative declaration either for or against this public use would not alter the dependence of the public upon the quotations. The urgent public necessity is here and will be here, whether courts or legislatures remain silent or act. The most that either of these coordinate branches of government can do is to recognize the already existent fact. The supreme court of Illinois has recognized it, and has most graphically portrayed the growth of this business and its influence upon the entire country. It has become, in the words of Mr. Rose in his notes, "a matter of urgent public necessity." Without a syllable in the bill, without a word of testimony in the record, this court would be bound to take judicial cognizance of it. To withdraw these quotations from the use of the public at large would throw the business of the country into inextri-

cable confusion and produce a public disaster infinitely greater than the Chicago fire. The situation could not be relieved until either a new method for fixing prices and doing this business should be established by the world at large, or until another market place of equal importance to the board of trade should be built up and established for the making and disseminating of quotations. In brief, it is hard to imagine any more extreme illustration of a public need than is furnished by the fact of the dependence of the public in its dealings upon these quotations. In the language of all of the authorities, this property, although owned by a private corporation, is devoted to a use in which the public have an interest. It has become public and subject to public control.

III.

The conditions exacted of the public in the contract with the telegraph companies are unreasonable, unjust, restrictive, and tend to the creation of a monopoly.

We now come in the course of our argument logically to the assertion of that well-founded and universal principle of law so cogently stated by Mr. Justice Brewer in the telephone case above referred to, that if property be given to the use of the public, and thereby impressed with a public trust, the owner of such property must deal with the public with reference to such use equitably and without discrimination. This is a principle that runs through all the cases, but, as illustrating its application, we cite the following:

Kalamazoo H. & B. Co. v. Sootsma, 84 Mich., 194; 47 N. W., 667.

R. R. Co. v. Langlois, 24 Pac., 209; 18 Am. State Rep., 745.

Lindsey v. Anniston, 104 Ala., 261; 16 So., 545.

Lough v. Outerbridge, 143 N. Y., 277.

Cincinnati, etc., R. R. Co. v. Village of Bowling Green, 570 St., 345; 49 N. E., 123.

Applying these principles as the test of the duty which the board of trade owes to the public, it remains to inquire whether it has performed it. The court, in its memorandum opinion, stated that the conditions were reasonable (see page 957). It said:

"The complainant does not wholly deny the Christie Company and Mr. Christie the right to acquire and use the quotations, but it has required the telegraph companies with whom it has contracted for their transmission and distribution, to first secure from every person desiring them a signed application, in which is embodied an agreement that the quotations shall not be used in the conduct of a bucket shop, and that they are for the private and individual use of the applicant and the business in which he is engaged. These conditions are well within the limits of a reasonable exercise of the right of property and power of control over the quotations possessed by the complainant. The defendants, The Christie Company and Mr. Christie, decline to comply with this requirement."

If this were, indeed, the substance of the requirement made by the board, an entirely different case would be presented to this court. Unwittingly, however, the court below totally misconceived not only the literal terms of the contract exacted of applicants for the quotations, but the spirit and object sought to be obtained by the board in making those exactions. Under the contract with the telegraph companies they are required to secure from every one wishing the quotations a signed application and agreement, which is set forth in complainant's bill. Paragraph one of that application describes the prohibited uses to which the applicant agrees he will not devote the quotations. We quote it as follows (p. 11):

"That we are not keeping or causing to be kept, and will not keep or cause to be kept any bucket shop or any office, store or other place wherein is conducted or permitted the

business of making or offering to make contracts, agreements, trades or transactions, respecting the purchase or sale or purchase and sale of any grain, provisions or other commodity or property, wherein both parties thereto or the undersigned contemplate or intend that such contracts, agreements, trades or transactions, shall be, or may be closed, adjusted or settled according or with reference to the public market quotations of prices made on any board of trade or exchange upon which the commodities or securities referred to in said contracts, agreements, trades or transactions are dealt in, and without a *bona fide* transaction on such board of trade or exchange, or wherein both parties or the undersigned shall contemplate or intend shall be or may be deemed closed or terminated when the public market quotations of prices made on such board of trade or exchange for the articles or securities named in said contracts, agreements, trades or transactions shall reach a certain figure."

It is further stipulated that the applications when signed shall be submitted to the board of trade by the telegraph companies for approval or rejection, and the determination of the board is final. Our objection to this contract is threefold:

First. It prohibits the transaction of lawful business by the applicant.

Second. Its object is to secure to the Board of Trade of Chicago and its allied exchanges a complete monopoly of this kind of business.

Third. In view of its manifest purpose to suppress competition of independent traders, the board is disqualified to act as the final and conclusive arbiter of applications from such traders.

We will discuss these objections in their order.

The language of paragraph one of the application quoted is somewhet obscure in describing the business prohibited

to the applicant for the quotations. However, it may fairly be analyzed to cover the following:

(*a.*) All sales or purchases which the parties thereto contemplate adjusting upon the basis of public market quotations but without a *bona fide* transaction of the board of trade. This feature is further elaborated, extending the provisions to all character of dealings, whether sales, purchases, or trades, and also extending the prohibition if the keeper of the place of business shall have such intention, irrespective of what may be the design of the parties to the contract. The gravamen of the offense is that the transaction is not conducted on the board of trade.

(*b.*) A sale which the parties contemplate may be closed when the public market quotations shall reach a certain figure, and this prohibition is again elaborated in the same manner as the other, to include sales, purchases, and trading contracts with reference thereto. Furthermore, they are prohibited whether the intent to so close them is possessed by the parties to the contract or the keeper of the place of business.

One is struck with the studious omission of the essential element of the offense of bucket-shopping or gambling as described by the courts or as denounced by the statutes. For example, under the first class of business prohibited, it will be observed that the words "on such board of trade or exchange" absolutely qualify and limit all the preceding language of the clause. In other words, no matter how absolute the intention of the parties may be to deliver the commodity which they may at that time own, their transaction is prohibited by this contract unless they make their trade upon the board of trade. Indeed, the language is so sweeping as to prohibit even present cash sales and delivery. The miller cannot avail himself of these quotations and buy his wheat from the farmer without the interposition of this mid-

dleman. No reason of public policy can be subserved in requiring the intervention of a broker.

The business of the Christie Grain and Stock Company is largely done between people who are not members of any board of trade, and consequently the necessity for making contracts off of boards of trade with the Christie Company is apparent. This is equally true of every independent dealer and trader. Obviously, their freedom to do so is essential to the success of their business. The customers of these independent dealers buy from them and sell to them large quantities of grain, and these transactions are made off of any board of trade. These dealers in turn do a great deal of business on boards of trade and with members of the Chicago, Kansas City, and St. Louis boards. Their business aggregates many millions of bushels. They might just as well go out of business as to agree that every trade made should be a *bona fide* transaction "*on a board of trade.*"

The carefully worded application, therefore, for the quotations prepared by the Chicago board for applicants to sign is in its last analysis an iron-clad agreement that the applicant will place every trade that he makes on a board of trade. The balance of the agreement in regard to the making and closing of these transactions is a mere pretense and a subterfuge, put in simply to deceive the courts and the people as to the real purpose of the board. Every transaction that is recited in the whole agreement as prohibited can legitimately be made on the Chicago Board of Trade between members at any time.

The court, therefore, was obviously wrong in construing the effect and purpose of this contract as a prohibition against bucket-shopping. We submit that the test, and the only test, as to a gambling transaction is the intention of the parties with reference to a delivery of the commodity. If this intention is lacking, if neither party owns the subject-matter of the trade and has no intention of producing it and making a delivery, but they are dealing in futures merely,

with an intention to close their trade by an adjustment of differences established by market quotations, the transaction is illegal and is so denounced by the statutes of Illinois and by the decisions of the courts. But, on the other hand, if they own the commodity dealt in, or intend to procure and deliver it in consummation of their trade, the transaction is lawful whether it be on or off a board of trade, and whether they are dealing with reference to future prices or not, and whether they subsequently settle and adjust their contract upon a basis of the market quotations without exacting a delivery.

The statute of Illinois provides that:

"It shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this State, any bucket shop, office, store, or other place, wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions, or other produce, either on margins or otherwise, *without any intention of receiving and paying for the property so bought, or of delivering the property so sold.*"

1 Starr & C. Ann. St., 1304.

The statute of Missouri is very similar (section 2223, vol. 1, Rev. St. 1899).

In the late case of *Central Stock and Grain Exchange v. Board of Trade*, 196 Ill., 396; 63 N. E., 741–2, the court said, quoting from its former decision in 134 Ill.:

"A consideration of the act will, as before indicated, show that it is directed against the keeping of any office or place, etc., wherein is conducted or permitted the pretended buying or selling of grain or other produce on margins or otherwise, without any intention of receiving the property bought or delivering it if sold."

In *Kent v. Miltenberger*, 13 Mo. App., 503, the court, in speaking of the ordinary grain option contract made on the Merchants' Exchange of St. Louis, said:

"It appears that delivery is always contemplated, not as a thing which will be necesserily insisted upon, but as a thing which the purchaser may insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts. * * * The circumstance which renders these contracts unlawful is a contemporaneous agreement that they shall not be executed by a delivery but only by a settlement of differences. Unless there is such an agreement, it is idle to talk about gambling intentions or wagering intentions or betting upon the future state of the market."

In *Clark v. Foss*, 7 Biss., 540, it was held that the intention that such a transaction should be a mere bet must constitute an integral part of the contract, and the court said:

"If the contracts were void at all they must have been void when made. The subsequent conduct of the parties may, and should, be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act of the parties can have the effect to render them obnoxious to the taint of illegality as being gambling contracts."

"It is the intention of the parties that gives character to a transaction on the board of trade. If either party contracts in good faith, he is entitled to the benefit of his contract, whatever may have been the secret purpose or intent of the other party."

Benson v. Morgan, 26 Ill. App., 22.

To the same effect, see *Edwards B. Co. v. Stevenson*, 160 Mo., 516; 61 S. W., 617.

"While a purchase of stock on margin for speculation is not gambling if it is the intention of the parties that a real purchase shall be made by the broker, though delivery be postponed or made to depend on future conditions, it is otherwise if it is the intention that there be no delivery, but that the account be settled on the basis of a rise or fall in prices."

Wagner v. Hildebrand, 187 Pa., 136; 41 Atl., 34.

"The true test of the validity of a contract for future delivery is whether it could be settled only in money and in no other way, or whether the party selling could tender and compel the acceptance of the particular commodity sold, or the party buying could compel the delivery of the commodity purchased."

Sampson v. Camperdown Cotton Mills, 82 Fed., 833.

"Where the buyer intends that a contract for future delivery shall be an actual delivery, and the seller expects to deliver, *unless the price goes beyond the contract price*, it is not a gambling contract, and does not come within section 3931, Revised Statutes, 1889."

Deierling v. Sloop, 67 Mo. App., 446.

"The settlement between principal and broker and payment of difference in price for which the stock was purchased and sold, has no tendency to show that the transactions between them were wagers."

Winward v. Lincoln, 51 Atl. (R. I.), 106.

This court recognized this same test. (See *Metropolitan National Bank v. Jansen*, 47 C. C. A., 497; 108 Fed., 572.)

See also the recent case of *Clews v. Jamieson*, 182 U. S., 460, 489 to 494.

Without further multiplication of authority upon this subject, therefore, it is clear that every transaction denounced by this provision of the contract exacted from the applicants could be made by the brokers of the board of trade upon the board of trade and would be upheld and enforced in the courts. If this be true, it must follow that such contracts are equally legitimate and enforceable if made between independent dealers without the intervention of a board of trade. There is certainly no particular sanctity hovering over a board of trade which can make transactions lawful there and unlawful if conducted anywhere else.

II. And this brings us to the real reason for this contract by the board of trade, namely, to prevent independent trad-

ing in these commodities and to draw to the board of trade an exclusive monopoly in this business. It is a well-known fact, which appears in this record, that there is an umbilical cord binding all of the boards of trade in the West and South to the Chicago Board of Trade and subordinating their business to the exactions of the Chicago Board of Trade. Any person doing business as a broker or otherwise upon the board of trade is compelled to yield one-half of the customary commission he receives to the brokers of the Chicago board if dealing in commodities covered by those quotations. The customary rate of commission upon all transactions of this character is one-eighth of 1 per cent. One-sixteenth of 1 per cent. goes as a tribute to this self-crowned, self-appointed Cæsar. This is the true inwardness of this exacted contract.

This is further shown in the testimony of the appellant Christie, which stands without contradiction in this record. Referring to a conversation between himself and Mr. Warren, the president, and Mr. Robbins, the attorney of the board, in which Christie sought to bring an end to the persecution with which his business had been followed, Mr. Christie testified (p. 527):

"Colonel Conley wrote me that I had better come over and see Mr. Warren personally, which I did. I saw Mr. Warren together with Mr. Robbins, and offered them one hundred and fifty dollars a month for the market reports and agreed that I would not make a trade in my office that was in any way prohibited by the laws of the State of Missouri. We discussed the question for quite a time and they refused.

"Q. Who discussed it?

"A. Mr. Robbins, Mr. Warren and myself, and it resulted in their refusing to give me the quotations unless I would agree that every order I got I would place on the board of trade. That I would not agree to."

We have heretofore pointed out the nature of the business of the Christie Grain and Stock Company, as well as that of

every other independent dealer, and have shown that an exaction of this character would effectually drive all such business out of the market. If they are to become mere adjuncts of the board of trade and compelled to pay tribute to that institution for every dollar's worth of business they may transact, irrespective of where it is done, it results in furthering and creating a most gigantic monopoly in the dealing with these essential elements of commerce. It divides the entire public into two classes, namely, the board of trade and its allied institutions and those not so connected or related. The former can freely buy, sell, and deal in these commodities; the latter may not do so under any circumstances or conditions whatsoever.

This presents the case to the court in all its naked deformity. It is an appeal to the equitable jurisdiction of the court to enable the Chicago Board of Trade to create and maintain a monopoly. This we do not believe it is within the equitable powers of the court to do. This we are confident the court will not do. In view of this inevitable purpose of this suit, after the mask has been removed, it is not a matter of wonder that in both his pleading and his argument the counsel for the board of trade has sedulously sought to conceal the true nature of this contro. versy. The late Matthew H. Carpenter used to frequently repeat a saying which is peculiarly applicable to the case in hand: "A lawsuit is seldom or never what it seems to be." Upon the face of this bill its purpose is a very just and worthy one, namely, to prevent bucket-shops having the tools with which to ply their illegal trade. Its real purpose and object, as we have seen, is to restrict and prevent independent trading and to compel all transactions to be made upon the board of trade. We challenge the counsel for appellee to show otherwise.

III. In direct furtherance of this plan and design of the board of trade to create a monopoly is that provision of the

contract with the telegraph companies which requires them to submit all applications for the quotations to the board for its final action and determination. It is unnecessary to quote at length the provisions of this remarkable contract in that behalf. Reduced to a simple proposition, the board is made the final arbiter and sole judge of the propriety of delivering these quotations to those desiring to use them. No remedy by appeal, no right of review, or any other redress for an arbitrary and unreasonable action of the board in this behalf is furnished by the contract. It acts secretly, and the applicant may never know the grounds upon which his application is rejected. The telegraph companies are strictly enjoined from furnishing these quotations against an adverse determination of the board.

So carefully has the board attempted to withdraw to itself the right of exclusive determination upon the subject that it undertakes to defend at its own expense all suits which may be brought against the telegraph companies to enforce delivery. In the case of independent traders, as for example, the appellants here, doing a very large and extended business throughout the country, could a more forceful weapon be placed in the hands of the board of trade to suppress them or to compel them to ally themselves with the board and submit to its exactions? It has used this very weapon against appellants. If this requirement can be upheld it is an end to independent trading. It can only be justified upon the theory that the board has an absolute and unqualified property in these quotations, and that they are not impressed with a public use. This theory, we have seen, is untenable. It must follow that the board cannot indirectly and by the subterfuge afforded through this power embodied in its contract withhold these quotations against its plain duty to allow publicity of them.

So unreasonable and unjust are the requirements by the board that its counsel has never yet, during the various stages of this litigation to the present time, attempted to

justify them as reasonable. The brunt of his argument was against the supposed case of one engaged in the unlawful business of bucket-shopping; but it is conceded here that the appellants are not engaged in that business, but, on the contrary, that their business is lawful and legitimate in every particular. Of necessity, therefore, counsel is driven to assert and does assert that the quotations are not impressed with a public trust; that the rule of equality is not binding upon the board, and that it has an absolute right to discriminate as to who shall receive the quotations totally without reference to the use that may be made of them. The argument may be summed up in the statement that inasmuch as the business is not impressed with a public use, but is a private business pure and simple, its right of property in the quotations is private; that it may refuse them to all, and inasmuch as it may refuse them to all, it may select invidiously or in anywise those who shall be the recipients of the service.

We challenge counsel for the appellee to show that this contract is not unreasonable, discriminative, and unfair as to the public at large, assuming that the quotations are impressed with a public use. We invite his fullest explanation of this contract to the court, and here prophesy that he will be unable to justify or uphold it under any theory or principle to be found in the books or inherently residing in the restrictions themselves.

IV.

The contract between the telegraph companies and the board of trade is violative of the act of Congress of July 2, 1890, chapter 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," otherwise known as the Sherman anti-trust act.

In dealing with the foregoing question we may be confronted with an objection that the particular defense was not pleaded in the answer. This is true. The assignments of error incorporate it, and it is also referred to in the printed brief which counsel for appellee filed with the court below and must have been presented there. This is a question, however, which is raised by the bill and contract and would be open for consideration in this court, even though not presented in the court below. It comes exactly within *Carter-Crume Co. v. Peurrung*, 30 C. C. A., 174; 86 Fed., 439. The cases are in all respects similar. We quote from the opinion of the court:

"But it is said that the contract in question is one in restraint of trade, and therefore void. This defense is here made for the first time. No suggestion as to its illegality is found in the pleadings; no reference thereto occurs in the charge, nor was any exception taken to any instruction given or refused. If it be true that this contract is one which, for reasons of public policy, is void, the defense in the court below would not be waived by a failure to properly plead." Citing *Coppell v. Hall*, 7 Wall., 542; *Oscanyan v. Arms Co.*, 103 U. S., 261, 268.

We think we have successfully shown that the contract between the telegraph companies and the board of trade is not a reasonable regulation of the use of these quotations by the public, but there inheres in this contract another

fatal vice. This suit has for its purpose the securing of the aid of the Federal courts in chancery in the enforcement of this contract, or, to put it in another form, if this contract was complied with according to its terms, there would be no occasion or justification for this suit. We have, we think, also sufficiently demonstrated that the ultimate effect as well as the original purpose of this contract was to create a monopoly in the Board of Trade of Chicago and related corporations. This purpose is in the present instance sought to be effectuated by the use of an instrumentality of interstate commerce, dealing with a subject of interstate commerce with reference to the performance of its public duties in that connection.

Two important inquiries stand at the threshold of this discussion. The first is whether the telegraph company is an instrument of interstate commerce and whether the business of telegraphing is commerce. Both of these questions are answered in two cases decided by the Supreme Court of the United States: *Pensacola Telegraph Company v. The Western Union Telegraph Company*, 96 U. S., 1, and *The Western Union Telegraph Company v. Texas*, 105 U. S., 460. See also the case of *Western Union Telegraph Company v. Pendleton*, 122 U. S., 347, 356.

The effect of these cases is stated in the case of *Telegraph Co. v. Texas*, 105 U. S., 464. The court says (speaking by Mr. Chief Justice Waite):

"A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways and their liabilities are in some respects different. But they are both indispensable to those engaged to any considerable extent in commercial pursuits."

There is, however, an underlying question here, and that is whether these market quotations are an "object," as the

old writers would say, or, in the modern verbiage, are a subject of commerce. If we had any doubt upon that subject, that doubt has been resolved by the appellee in the careful and studied allegations of his bill. He says (see page 5 of Record):

"And the knowledge of the prices thus made on said transactions during said market hours upon said exchange have become a species of property of such large value to your orator that telegraph companies are willing to pay your orator large sums of money for the privilege of receiving instantaneously said quotations *and selling the same to their customers.* And many persons throughout the United States who are engaged in the grain and provision business are willing to pay, *and for many years have paid said telegraph companies large sums of money therefor.*"

And thereupon follow the prices at which these quotations are sold and delivered to various persons in and out of Chicago and in and outside of the State of Illinois. It seems clear, then, that these quotations are a subject of commerce; that they are a subject of traffic in which the telegraph companies are engaged with the public and are selling to the public and are using this instrumentality of interstate commerce for the purpose of delivering them to their customers the same as a railroad would deliver a car of coal or any other commercial commodity. There, then, reside in the very nature and essence of these things and in the use that the public has been accustomed to make of them and their method of acquiring them all of the attributes of a subject or object of commerce.

This commerce is confessedly both State and interstate, but, so far as this bill is concerned, it is of necessity all interstate, because the service to be rendered by the telegraph company is initiated in Chicago and completed in Kansas City, Missouri, and in principle there is no difference between it and a train-load of fruit or vegetables shipped from California to Chicago or from Chicago to Kansas City.

But we are not without judicial definition of what constitutes interstate commerce, and a few quotations from the adjudicated cases will serve the convenience of the court in the apprehension of this question, and we here append them:

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities (*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 196–203; *Kidd v. Pearson*, 128 U. S., 1, 20). If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States, it is brought within the provisions of the statute."

Addyston Pipe & Steel Co. v. United States, 175 U. S., 241.

"'Commerce undoubtedly is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse.'"

Gibbons v. Ogden, 9 Wheat., 1, 189, 210.

"Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value."

Brown v. State of Maryland, 12 Wheat., 447.

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. To regulate it, as thus defined, there must be only one system of rules applicable alike to the whole country, which Congress alone can prescribe."

County of Mobile v. Kimball, 102 U. S., 691.

In *Bowman v. Chicago R. R. Co.*, 125 U. S., 490, the court said:

"What, then, is the assumption of the State court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the State laws, and asserted as the State policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce."

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S., 203, 204, the court said:

"Transportation implies the taking up of persons or property at some point and putting them down at another. * * * The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed."

See also—

Leisy v. Hardin, 135 U. S., 113.
The License cases, 5 How., 599.
In re Rahrer, 140 U. S., 557.

That the contract between the telegraph companies and the board of trade might be claimed to be obnoxious to the prohibitions of the Sherman anti-trust act seems to have occurred to counsel for appellee, because, in the brief that he filed in the

court below, he undertakes to answer such objection and to dismiss it summarily by the following statement, which we quote (p. 57):

"The Federal anti-trust act of July 2, 1890, has no application. It concerns only interstate commerce. These contracts are in no sense a part of that commerce. They were made in the State of Illinois and are in effect a purchase there of these quotations for a certain period of time by the telegraph companies from the board of trade. The contract provides for the delivery of the quotations by the board of trade to the telegraph companies in Chicago. They do not contemplate or require a transmission of the quotations to, or a sale thereof in, any other State. If sold in other States, they are, in the very nature of things, transmitted to those other States over the wires of the telegraph companies, and when they reach there, are still the property of the telegraph companies until sold by them to their customers there. The act of selling in the other States is not an act of interstate commerce. Certainly where one buys property in one State of a resident thereof, to be delivered there, such purchase does not fall within the domain of interstate commerce, because the purchaser may intend to, or may in fact, afterwards transport the property purchased to another State for sale by him there. Upon this question *Hopkins v. United States*, 171 U. S., 578, is conclusive."

We give counsel for appellant the benefit of his entire statement and argument upon this head. To be sure, his statement of this question is incorrect, not to say confused, and certainly inconclusive. He has not stated the facts as they appear upon the record and elsewhere admitted by himself. If the telegraph companies bought and received these quotations in Chicago, to be delivered elsewhere at the free will of the telegraph companies, without regulation or restriction, then it is true that the sale, so far as the board of trade is concerned, would not be an interstate sale. Neither would such a simple business transaction come within the condemnation of the Sherman act. This is too plain for argument, but it is obviously not this case.

The declaration of counsel, however, that the transmission by the telegraph companies of these quotations from Chicago to Kansas City and their sale there to the appellants would not be interstate commerce, is a misstatement of the law as it has been enunciated in the very case which he cites. In that case the court said:

"The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce." * * *

Hopkins v. United States, supra, 590.

On page 591 the court said:

"Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade."

This is all that the Hopkins case decides, and it will be observed that the decision is limited clearly and strictly within very narrow bounds. It relates to accessorial and incidental local services rendered with reference to the sale. But if we assume that the commission merchants referred to in the Hopkins case had also to do with the purchase and transportation of the cattle from points beyond the State where sold, or were the owners of the cattle, another and entirely different question would be presented. They would undoubtedly be prohibited by any combination to engage in a confederacy to regulate interstate commerce.

If the board of trade wants to bring itself within the rule of the Hopkins case it can only do so by ceasing to have any

control or dominion over these quotations after it delivers them to the telegraph companies. It is not content to do that. It follows them into other States and claims that by virtue of its contract with the telegraph companies it still possesses an interest in the quotations sufficient to secure from persons in other States the performance of conditions precedent to their reception and enjoyment.

A very excellent test as to whether these quotations are or are not commerce within the meaning of these adjudicated cases is to suppose that the State of Illinois should pass an act limiting the persons in other States who should receive these quotations, or, in other words, should substantially embody this contract in a legislative enactment. Would that, or would it not, be a regulation of interstate commerce?

This contract does not operate upon the board of trade, but wholly upon the telegraph companies in the exercise of a public duty, and, by way of consequence, upon the public which the telegraph companies are created to serve. The telegraph companies have paid a price for the privilege of disseminating these quotations and selling them, and in that respect have broadened their public function. But as an incident to the price paid and as part of the consideration they have entered into an agreement with the board of trade, whereby they bind themselves to sell these quotations and to deliver them, either within or without the State of Illinois, only to such members of the public as may be agreeable to the board of trade, for reasons peculiarly and selfishly its own. It must not be forgotten in this argument that the telegraph companies are not a mere instrumentality of sending these quotations to any one to whom the board of trade has sold them exclusively, but the telegraph companies have bought them and have limited and restricted their right to sell and dispose of the quotations by combining with the board of trade to that end.

The means of getting this property to any contemplated

purchaser is over the telegraph line. The person having this property in possession sells it to the telegraph company, with a proviso, however, that the telegraph company shall not sell and transport it (and the only means of making it available is by interstate transportation) to any but a favored few. Does not this restrain commerce in that commodity? Is not that the inevitable effect of such a contract? How forced and unnatural would be any construction upon this transaction that could lead to any other result. We have a right to assume the intention of the parties to such an agreement from its inescapable result.

We are dealing here with a combination and confederacy and assuming the existence of a property right in a commodity which is the subject of commerce. This property would be valueless to the public or to the board of trade were it not for the intervening instrumentality of the telegraph companies, and the telegraph companies cannot get any value except by making a connection with the board of trade. The board of trade offers the privilege of its floor to the telegraph companies for the procurement of this commodity to be sold and disseminated by it. The telegraph companies pay a fixed price for that privilege, but then and there they enter into a combination and agreement with the board of trade that in selling and disposing of it to the public and in giving the public the benefit of the use of this commodity, of which the board of trade has a monopoly, they will be governed in that respect by the regulations and directions of the board of trade as to the persons they will so serve. It is the *combination* and the *subject-matter* that bring this transaction within the terms of the statute.

It was for a long time contended that the provision of the act of Congress conferring rights of exclusive legislation was only operative upon the States and their subordinate bodies and that under the fifth amendment to the Constitution the free right of contract existed in favor of private persons and corporations, although the effect of such contracts was to re-

strict or regulate commerce between the States. That this limitation did not exist, and that the Federal court had equal cognizance of contracts between individuals as of statutes, ordinances, and judicial regulations, was noticed by Justice Brewer in the Debs case. We quote from the decision (158 U. S. Rep., p. 581), as follows:

"It is curious to note the fact, that in a large proportion of the cases in respect to interstate commerce brought to this court, the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

But the question was forever set at rest in the case of *The Addyston Pipe and Steel Company v. United States*, 175 U. S., 211. Of course, this case is entirely familiar to the court, and we can only invite its full consideration and a comparison of the facts in that case and this and the contract there with the contract here. There it was a combination among certain pipe manufacturers for the purpose of regulating the output of their factories and the prices which they should receive throughout a portion of the United States. Here it is a combination between a telegraph company, an instrument of interstate commerce, and the board of trade, each of which is directly interested in the subject-matter of the contract, namely, the quotations arising upon the board. The subject of the agreement is the sale and distribution of such quotations throughout the United States. In both cases the essential objects to be attained require a combination involving a regulation and restriction of commerce with reference to the subject-matter of the contract. Moreover, another point of similarity between the cases is that commerce is not

restrained or affected incidentally, but as a necessary and proximate and intended result of the combination. The combination is brought into life for no other purpose than to restrain commerce. The only thing which could have animated the board of trade and the telegraph companies in entering into this contract was the regulation of the sale and distribution of these quotations. The whole subject-matter of the contract relates to such sale. Eliminate the purpose of sale from their contract, and it makes it a thing for the waste-paper basket only. It is in this essential particular that the case differs, for example, from the rule announced in *United States v. Knight*, 156 U. S., p. 1. There the influence upon commerce of the arrangement between the sugar refiners was held by the Supreme Court to be not the evident and obvious purpose of the agreement, but, if at all, to be a mere incident flowing from a legitimate and proper arrangement among manufacturers.

The mere fact of regulation, whether reasonable or unreasonable, brings the case within the statute.

It makes no difference under this aspect of the case whether the regulation and restriction put upon the telegraph companies by virtue of this combination is reasonable to the public to be served, or to the parties to the contract, or not. The gravamen of the offending feature of the contract is that it regulates and restrains. In this respect the courts have no office to perform but to declare such combinations and agreements to be void. In the most recent of the cases upon this point all of the authorities are collated and discussed by the circuit court of appeals of the sixth circuit in the case of *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed., 610, the decision being by Judge Day. To emphasize this particular point, we quote briefly from the opinion (p. 619):

"Is the contract in restraint of trade, within the meaning of the law? As we understand the decisions of the Supreme

Court of the United States, the construction of the statute is no longer an open question. At the common law contracts were invalid when in unreasonable restraint of trade, and were not enforced by the courts. (See opinion of this court per Taft, circuit judge, in *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A., 141; 85 Fed., 271–279; 46 L. R. A., 122.) By the Constitution of the United States Congress is given plenary power to regulate commerce between the States and with foreign nations. In the exercise of this power Congress may prevent interference by the States with the freedom of interstate commerce, and may likewise prohibit individuals, by contract or otherwise, from impeding the free and untrammeled flow of such trade. In the exercise of this right Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States (*U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S., 290; 17 Sup. Ct., 540; 41 L. Ed., 1007; *U. S. v. Joint Traffic Ass'n*, 171 U. S., 505; 19 Sup. Ct., 25; 43 L. Ed., 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S., 211; 20 Sup. Ct., 96; 44 L. Ed., 136)."

If the contract between the board of trade and telegraph companies is illegal, a court of equity will not lend its aid to its enforcement.

If this contract is one which regulates interstate commerce, and is therefore forbidden by the statute, no right can be asserted in this or any other court to the maintenance of its terms and the enforcement of its obligations upon any individual. It comes within the very ancient maxim of the law, *ex dolo malo non oritur actio*. There could not be a specific enforcement between the parties to the agreement in any court, and *a fortiori* it cannot be enforced against any third party. In the case presented the contract need not be against public morals, but it is a contract prohibited by stat-

ute, and any violation of the express terms of the statute subjects, in a proper proceeding, the parties to the contract to a penal action. The law is well settled that no court will lend its aid to further, much less to enforce, the terms of such a contract.

In *McMullen v. Hoffman*, 174 U. S., 639, 654, which involved a contract restraining competition in bidding for public work, the court said, in review of many of the authorities:

"The authorities, from the earliest time to the present, unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis*."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 548, the court declares it to be undoubtedly "the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey v. Johnson*, 131 U. S., 336, 348." But it needs no citation of authority to establish so obvious a rule.

V.

This contract is finally void as being violative of section 8, article 1, of the Constitution of the United States, relating to interstate commerce.

We have shown that the contract in question is violative of the Sherman anti-trust act, so called, as involving an unlawful combination in restraint of interstate commerce. We are also constrained to put upon our belief that it is also void as being violative of the constitutional provision which forbids the regulation of interstate commerce by any power save

that of Congress. The language used in the Addyston Pipe case, above cited, limiting judicial power over contracts to reprobation or prevention of such as violate the Sherman anti-trust act, is applicable to the facts in that case; but this case is distinguishable from that case in an important particular: That was a contract between individuals relating to their private business and its management. This case involves a control, domination, regulation, and restraint of an instrument of interstate commerce. It is a matter of public history of which this court is bound to take notice, because the fact is embodied in decisions of the Federal courts, that the Western Union Telegraph Company has complied with the provisions of the act of Congress of 1866, which confers upon it the right to use and occupy the public domain of the United States and the post-roads of the United States for the uses and purposes of its telegraph, and to take timber and stone from public lands, and otherwise is given rights tantamount to the rights conferred upon corporations exercising the power of eminent domain. (See *Teleg. Co. v. Texas*, 105 U. S., 460.) Outside of this act and under the laws of the various States of the Union, the telegraph companies in addition have the power of eminent domain and are to the same extent as railroads quasi-public corporations. The cases of railroads and telegraphs are parallel in so far as their obligations to the public are concerned, and the same rights, immunities, and privileges are given to each.

A contract whereby the duties and obligations of such instrumentality to the public are restricted, governed, and directed is obviously a different contract than one between individuals. Here, by operating upon the instrumentality itself, the operation is as direct and absolute as if it were, by force of a State law, made to accomplish such regulation.

In the Debs case the question turned upon the very fact here adverted to, that the operation of Debs' conduct was upon an instrumentality of interstate commerce, and regulated, restrained, and obstructed it, and in this connection

we feel it not redundant to again quote part of the language of Mr. Justice Brewer as applicable to this particular contention:

"If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has the power which the State itself does not possess?"

Congress has aided and established these telegraph lines as instruments of its own, has given them extraordinary powers and privileges, and has in the most signal and conspicuous way put upon them the seal of a public agency. Can such public agent, therefore, be by contract subjected to the rule and dominion of an individual or a private corporation? The statement of this proposition, it seems to us, carries with it its complete answer. *In re Debs* the court ruled the case upon the broader principle that any obstruction of commerce by operating upon its instrument was violative of and an infringement upon the exclusive jurisdiction of Congress in that behalf.

We therefore contend that upon this broader doctrine the contract can obtain no judicial support and countenance.

Finally, upon all the foregoing considerations of law and fact, we submit this case and ask that this court shall vacate the order of the trial judge and direct that a decree be entered in the court below dismissing appellee's bill.

All of which is respectfully submitted.

W. H. Rossington,
Chas. Blood Smith,
Clifford Histed,
Solicitors and of Counsel for Appellants.

APR 26 1905
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

THE L. A. KINSEY COMPANY, *et al.*,
Petitioners,
against
BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

No. 280.
On Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,
against
CHRISTIE GRAIN AND STOCK COMPANY, *et al.*,
Respondents.

No. 224.
Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Brief submitted by leave of Court, in behalf of Edwin Hawley and Frank B. Ray solely on the nature of a Wagering Contract.

JULIEN T. DAVIES,
ABRAM I. ELKUS,
GARRARD GLENN,
Of Counsel for Edwin Hawley and Frank B. Ray.

In the Supreme Court of the United States.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

against

CHRISTIE GRAIN AND STOCK COMPANY, *et al.*,
Respondents.
(Two cases.)

OCTOBER TERM, 1904.
Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

L. A. KINSEY COMPANY, *et al.*,
Petitioners,

against

BOARD OF TRADE OF THE CITY OF CHICAGO,
Respondent.

OCTOBER TERM, 1904.
Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Brief filed by permission of the Court on behalf of Edwin Hawley and Frank H. Ray upon the question as to what constitutes a Wagering Contract.

Upon the records in the cases at bar the question arises as to what constitutes a wagering contract. Upon this single point we desire to submit an argument.

Statement of Facts.

The contracts in question are those made for the supposed purchase of various commodities upon the floor of the Chicago Board of Trade. These are in form contracts

for sale and delivery but were found by the Court below to be transactions in which actual transfers of a commodity were not contemplated, and, in fact, wagers upon the daily rise or fall of prices.

We desire to discuss briefly the nature of these transactions, the method of determining what they really are, and the question of their legality.

POINTS.

I.

The nature of these contracts.

The transactions under consideration must be distinguished from transactions upon the London Stock Exchange, the New York Stock Exchange or the Chicago Stock Exchange, where performance by the parties is actually contemplated and where deliveries are, by the rules of the Exchange, required to be made either daily or upon fixed settling days, and where in the event of default the defaulting party is sold under the rule.

In the Christie case (125 Fed. Rep., 161), the facts as stated in the opinion of MR. JUSTICE SHIRAS, at page 167, writing for the Circuit Court of Appeals, Eighth Circuit, were:

> "Of the nature of the business carried on by the members of the Board of Trade there can be no question under the evidence submitted in this case. The testimony of the president of the board, William S. Warren, and of a large number of the members of the board was taken for the purpose of showing the character of the transactions had upon the floor of the exchange hall; and there is absolute unanimity in their evidence to the effect that much the larger part of these

transactions were deals wherein it was not expected or understood that there would be any delivery of the article nominally dealt in, but the same were carried through and settled by methods clearly devised to avoid the need of actual delivery. The estimates of the witnesses vary as to the percentage of the transactions in which actual delivery was contemplated or had, running from 1 to 15 per cent., thus proving that at least 85 per cent. and more, probably 95 per cent., of the transactions would come under the condemnation of the Illinois statute. We do not deem it necessary to set forth the details of this testimony, which can be found in the opinion of Judge Thompson in the case of The Board of Trade of the City of Chicago *v.* O'Dell Commission Co. (C. C.), 115 Fed., 574. In that case, and in Board of Trade *v.* Donovan Commission Co. (C. C.), 121 Fed.. 1012, upon consideration of substantially the same evidence submitted in this case, the conclusion was reached that over 90 per cent. of the transactions had on the floor of the exchange hall maintained by the Chicago Board of Trade were purely gambling transactions."

In the Kinsey case (130 Fed. Rep., 507), at page 509, in findings of the Master below, the following occurs:

"It does appear, however, that the volume of such business is enormous; one firm conducted transactions in wheat daily aggregating 1,500,000 to 2,000,000 bushels, and in corn 1,000,000 bushels daily; another firm's transactions in wheat daily amounted to 6,000,000 bushels; a third firm's transactions in wheat daily amounted to 4,000,000 bushels; a fourth firm's transactions amounted to 1,000,000 bushels daily; a fifth firm's transactions in all grain amounted to 1,800,000 bushels daily; and a sixth firm's transactions in all grains amounted to 2,000,000 bushels daily. While it is true that the business of these six firms in the pits is much larger than the business of any other six firms conducting transactions in the pits, and that it would not be proper to say that the average business is a proper average of each of the persons conducting transactions in the pits, it is nevertheless true that it is fairly deducible from the evidence that the aggregate business transactions in grain was largely in excess of the total wheat and corn production of the entire United States during either of the years 1900 and 1901, and was many times over the entire receipts in Chicago of grain during each of said two years of 1900 and 1901, and of such receipts in Chicago, less than 20 per cent. inspected up to grades of

grain which could be delivered upon time contracts made by said sales and purchases in the pits. It is also true that a decrease in the total grain productions of the United States does not cause a proportionate decrease in the volume of business done in the 'pits' of the complainant association, but, on the contrary, such business is larger during a year in which there is a shortage in the grain crop."

The real nature of these contracts appears when the circumstances under which they are made are given due weight. The parties to these contracts are members of an exchange which has for one of its objects the dissemination among its members of all information obtainable concerning the annual crops and the amount of trading in the various grains. These persons know that the average daily transactions on their exchange are larger than the whole amount of available wheat and grain in the United States. They know that it is a physical impossibility to carry out, according to their terms, the contracts made by them. They also know, from experience and the methods of the exchange, that the contracts made upon the exchange not only cannot but will not be consummated by delivery. Knowing these things, these persons agree that on a certain day in the future one will take from the other and pay for at a fixed price a certain quantity of a given commodity. If these were *bona fide* contracts, each party to them would remain a party to the end; or, if he assigned his contract to another, would give the other party notice of such assignment and obtain his consent thereto in order to effect a novation. The purchaser would arrange for money to meet his contract obligation. The seller would endeavor to procure from the producer the article which he has sold and to arrange for its transportation in order that due delivery could be made. Quite

different is it with these members of the Chicago Board of Trade. No pretense is made of retaining the contract in its integrity. No steps are taken looking towards actual delivery. Instead, at the close of each day, through the system of ringing, all contracts made upon that day between the members of the exchange are shifted and switched around in such a way that parties are juggled from one contract to another and from a contract with one party to a contract with another in an amazing fashion, with the result that, at the close of the process, each broker finds himself a party to a different contract, perhaps with a different party, and the original contract has vanished, he does not know where.

At eleven in the morning on the Exchange A contracts to deliver to B five thousand bushels of corn. At the close of the day after the contracts have been "rung" it may be that A will emerge from the process as vendee to C and his contract with B will be gone.

As appears by the Master's report in the Kinsey case, at least three-quarters of the total transactions in the pits are adjusted by the direct and the ring method. The direct method is a simpler form than the ring method and it is described by the Master in the Kinsey case (130 Fed. Rep., 509,p. 510) as follows:

> "Most time contracts made in the 'pits' are adjusted as between members of the complainant association before the specified time of delivery arrives, by either the first or the second of the above-named methods. Direct settlements are effected by offsetting similar contracts at the close of the business hours of each day in the following manner: As soon as is practicable after the close of business in the pits, each broker (individual, firm or corporation) conducting business in the pits, takes from the day's transactions on his books the contracts similar as to amount and time of delivery to counter contracts made

with other members of the complainant association, and ascertains therefrom the difference of the aggregate prices of such similar contracts, and if the difference be in his favor, the amount of such difference is charged to the other party in such counter contracts; and, if the difference is against him, such difference is credited to the other party to such counter contract. The following is a simple illustration: If, during the day, broker A has sold to broker B 5,000 bushels of December wheat at 75 cents per bushel, and broker B has sold to broker A 5,000 bushels of December wheat at 76 cents per bushel, after offsetting the contracts at 75 cents per bushel, there is a difference in B's favor of one cent on each bushel, or $50. This offsetting difference in cash is placed as a debit or credit, as the case may be, upon the clearing house sheet, hereinafter described, of the respective brokers, parties to said counter or offsetting contracts."

The standard by which these contracts are settled is the so-called market price, of which the courts hear so much when an attempt is made to show the real nature of these transactions. This market price is purely artificial. It is a market price only in name and it is not secured by taking the actual sales for the day from the trade journals. The actual producer has nothing to do with fixing it, it is nothing more or less than the prevailing quotation from the daily betting ring. The standard is fixed by the trend of like gambling contracts made during the day under the roof of the same gambling house. The standard rises and falls as the majority of the bettors place their wagers on higher or lower prices for the commodity. Each betting transaction must be settled upon the quotations created by the total number of like transactions. Each dealer wins or loses according to his accuracy in gauging the day's prices. At the end of the day each transaction loses its contractual features, the obligations for future delivery of a fixed quantity of a commodity at a fixed price vanish, and are replaced by a debit or credit

cash item. The so-called contracts thus appear to be mere subterfuges for a daily transfer of money between the members of the exchange and their principals according to the movements of prices in the different commodities. The dealings are not in commodities but in differences.

II.

Principles applying to these transactions.

We have already pointed out that in all Stock Exchange transactions actual delivery of the stock sold always takes place, being required by the rules of those exchanges. No settlement of differences in market prices is had. In view of this the decision of this Court in *Clews* vs. *Jamieson* (182 U. S., 461), has no bearing upon the cases at bar.

In that case a bill in equity was filed against the governors of the Chicago Stock Exchange and others to recover certain margins put up by the plaintiff, secured on the sale of stock "for the account." The plaintiff's broker, one Schwartz, sold for the account to the defendant Jamieson. Schwartz failed, and the plaintiff got the stock and tendered it to the defendant Jamieson, who defaulted. Whereupon, the plaintiff, after notice to Jamieson, sold the stock to the highest bidder. The Court held that this contract was not a wagering agreement.

MR. JUSTICE PECKHAM, said at page 492:

"To say that such rules afford strong ground to infer an understanding between the parties doing business subject to them—that their con-

tract was not one of actual sale but merely one to speculate upon differences—is, in our opinion, to presume an illegal contract against its plain terms, and without any sound basis for the presumption. Thus, if an individual agreeing to purchase and pay for certain stock at a future date fails or refuses to perform his contract, the stock is sold under the rule, the price received and the difference between the price at which it sold and the contract price he is held answerable for."

In this case, however, MR. JUSTICE HARLAN dissented in the following language:

"I dissent ftom the opinion and judgment in this case upon the ground * * * that the transactions involved in this litigation constituted gambling indifferences."

It has been held in so many jurisdictions that it is, as this Court has said, the American, as distinct from the English rule, that contracts to be performed only by the payment of differences, are void at common law in the absence of statute.

Irwin vs. *Williar*, 110 U. S., 499.
Ball vs. *Davis*, 1 N. Y. St. Rep., 517.
Flagg vs. *Gilpin*, 17 R. I., 10.
Rumsey vs. *Berry*, 65 Me., 575.
Gregory vs. *Wendell*, 39 Mich., 337.
Mohr vs. *Meisen*, 47 Minn., 228.
Brua's Appeal, 55 Pa. St., 294.

As this Court said, in *Irwin* vs. *Williar*, 110 U. S., 499:

"In England it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable, while generally, in this country, all wagering contracts are held to be illegal and void as against public policy."

In *Flagg* vs. *Gilpin* (17 R. I., 10), the Court said:

"No case has been cited and we have seen no case in the reports of any of the states which holds that the contract has any validity.

This particular kind of gambling has been repeatedly denounced by the American courts as one which it is the policy of the law particularly to guard against, and the practice of dealing in differences has been denounced in the severest terms by these courts.

Cunningham vs. *Bank of Augusta*, 71 Ga., 400.

Brua's Appeal, 55 Pa. St., 294.

Cothran vs. *Ellis*, 125 Ill., 496.

Rudolph vs. *Winters*, 7 Neb., 126.

In *Cothran* vs. *Ellis* (125 Ill., 496), the Court described this practice as the "national sin."

In *Cunningham* vs. *Bank of Augusta* (71 Ga., 400), BLANDFORD, *J.*, said:

"A betting on a game of faro, brag, or poker, cannot be more hazardous, dangerous or uncertain. Indeed, it may be said that these animals are tame, gentle and submissive, compared to this monster. The law has caged them and driven them to their dens; they have been outlawed, while this ferocious beast has been allowed to stalk about in open mid-day, with gilded signs and flaming advertisements, to lure the unhappy victim to its embrace of death and destruction. What are some of the consequences of these speculations on 'futures?' The faithful chroniclers of the day have informed us, as growing directly out of these nefarious practices, that there have been bankruptcies, defalcations of public officers, embezzlements, forgeries, larcenies, and death. Certainly no one will contend for one moment, that a transaction fraught with such evil consequences is not immoral, illegal, and contrary to public policy."

In *Brua's Appeal* (55 Pa. St., 294), the Court said:

"Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it may be called. * * *

All gambling is immoral. I apprehend that the losses incident to the practice disclosed in this very case, within the past five years, have

contributed more to the failures and embezzlements by public officers, clerks, agents and others acting in fiduciary relations, public and private, than any other known, or perhaps, all other causes; and the worst of it is, that in the train of its evils, there is a vast amount of misery and suffering by persons entirely guiltless of any participation in the cause of it."

A well-established principle has resulted from the decisions upon this question, which all the authorities support, viz.:

A contract which in form is for the purpose of the sale of a commodity, is void as a wagering agreement if at the time of the making it neither party intends to accept or to deliver the commodities called for, but to adjust their relative rights at or before the maturity of the contract by the payment by one party to the other, as the case may be, of the difference between the contract price and a price as created by some outside standard, whether that be the prevailing market price or otherwise.

The principle is applied according to the following rules:

1. *The* FORM *of the contract is unimportant.* The *actual intent* of the parties at the time of the making of the contract is the absolute test.

2. *This intent may be proven by the circumstances surrounding the transaction, and proof of such circumstances is received with great liberality.*

We will first discuss Rule 1, which is founded on the following leading cases:

Irwin vs. *Williar*, 110 U. S., 499.
Higgins vs. *McCrea*, 116 U. S., 671.
Embrey vs. *Jemison*, 131 U. S., 336.
Pierce vs. *Rice*, 142 U. S., 28.
Story vs. *Salomon*, 71 N. Y., 420.

Peck vs. *Doran–Wright Co.*, 57 Hun, 343.
Kenyon vs. *Luther*, 4 N. Y. Supp., 498.
Cover vs. *Smith*, 82 Md., 586.
Lester vs. *Buel*, 49 Ohio St., 240.
Rumsey vs. *Berry*, 65 Me., 570.
Gregory vs. *Wendell*, 39 Mich., 337.
Flagg vs. *Baldwin*, 38 N. J. Eq., 219.
Sharp vs. *Stalker*, 63 N. J. Eq., 596.

In *Embrey* vs. *Jemison* (131 U. S., 336), and action was brought on notes executed by the defendant to the firm of Moody & Jemison, members of the New York Cotton Exchange. The defendant filed a special plea of wager, averring that he contracted with the plaintiff to purchase for him on margins not actual cotton but 4,000 bales of future delivery cotton for May delivery, called "futures"; that thereafter the price fluctuated, and the plaintiff called on the defendant for more margin, which the defendant informed the plaintiff he was not able to pay; that thereafter the plaintiff called on him to make good the resulting loss, and the defendant executed the notes in suit. A demurrer to this plea was sustained and defendant brought error. This Court reversed the judgment, and speaking through Mr. Justice Harlan, said:

> "The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying 'cotton futures,' for which he, or they, contracted, when, according to the averments of the rejected plea, neither party contemplated the purchase or delivery in fact of cotton, and when it was understood that any settlement in respect to such purchase should be exclusively upon the basis of one party paying to the other only 'the difference between the contract price and the market price in said cotton futures according to the fluctuations in the market.' If this was not a wagering contract under the guise of a contract of sale, it would be diffi-

cult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be avoided. The essential inquiry in every case is as to the necessary effect of the contract, and the real intention of the parties."

Irwin vs. *Williar* (110 U. S., 499) was an action by brokers against their customer for losses sustained on the short sale of wheat futures. There was a verdict for the plaintiff, and the defendant brought error. This Court held that the instructions of the learned Circuit Judge to the jury were correct and the defendant was not prejudiced thereby. These instructions, in substance, embraced the following points:

(1) A contract of sale is invalidated if both parties understand the transaction as really being one merely for its settlement by the payment of differences.

(2) The fact that a bet or wager is made to assume the form of a contract does not preclude either party from showing the real nature of the transaction.

In *Higgins* vs. *McCrea* (116 U. S., 671) an action was brought by brokers against their customer for losses on the purchase of lard and pork futures under the rules of the Chicago Board of Trade (the same Exchange involved in these appeals), and made on the floor of the Exchange. The defendant counterclaimed for money advanced to the plaintiff for illegal purposes, to wit, for gambling transactions, averring that the parties never intended actually to receive the commodity which they contracted to buy. It appeared from the evidence that the contract with the defendant had been "rung up" exactly as appears on the record in the present cases. The court held that the

plaintiff could not recover because this contract had been "rung," and there had been substituted as s party to it a stranger to the defendant with whom the defendant could not be brought into privity except with his consent. It was also held that the defendant could not recover on his counterclaim because the state statute (of Ohio) did not provide for an action to recover back money paid out for gambling purposes and in the absence of statute the parties were in *pari delicto*.

In *Pierce* vs. *Rice* (142 U. S., 28), this Court held that a note given by a customer to a broker to cover losses on the purchase of wheat futures was void. Mr. JUSTICE HARLAN, at page 41, said:

> "In respect to the character of the transactions resulting in the claim of Hooker & Co. against Foote for $22,165.72, which the latter settled by a transfer of the four Couch notes, with guaranty of their payment, but little need be said. What the evidence was upon this point in Jackson, Receiver, *vs.* Foote, we are not informed otherwise than by the decision of the court in that case. But the evidence before us is overwhelming to the effect that the real object of the arrangement between Hooker & Co. and Foote was, not to contract for the actual delivery, in the future, of grain or other commodities—which contracts would not have been illegal—but merely to speculate upon the rise and fall in prices, with an explicit understanding, from the outset, that the property apparently contracted for was not to be delivered, and that the transactions were to be closed only by the payment of the differences between the contract price and the market price at the time fixed for the execution of the contract. There was no material part of the claim of Hooker & Co. that was not based upon a palpable violation of the statute. The parties deliberately engaged in what is called gambling in differences. It results that both the transfer and guaranty of the Couch notes to Hooker & Co. were void under the statute, and passed no title to them or to their assignee."

Nor has there been any later declaration by this Court which is at variance with the views expressed in the preceding cases.

Bibb vs. *Allen* (149 U. S., 481) was a simple case of failure of proof on the part of him who alleged that the contract was a wagering contract. In that case an action was brought by a member of the New York Cotton Exchange against a customer for commissions and disbursements in the sales of cotton futures under the rules of the New York Cotton Exchange. This Court held for the plaintiff for the following reasons, as expressed on pages 490–2:

> "But the facts in this case do not bring the transaction in question within the operation of that principle, for the evidence set out in the bill of exceptions fails to show that either party to the transactions intended the same as wagering or gambling speculations. On the contrary, the undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon. Bibb's own statement of the transactions does not disclose the fact that they were intended even on his part as gambling or wagering speculations. He certainly never disclosed to the plaintiffs as his brokers, through correspondence or verbal communications, that he did not intend to deliver the cotton sold through them for future delivery."

Speaking of the charge of the Circuit Judge, which was approved in Irwin *vs.* Williar (110 U. S., 499), this Court said:

> "This court approved that charge as a correct statement of the law upon the subject of what constitutes a wagering contract. It is directly in point herein that the evidence fails to show not only that Bibb & Co. had intended it as a wagering contract, but it fails to show also that the plaintiffs so understood it. The testimony establishes that the plaintiffs did not in fact so understand it."

In Sharpe *vs.* Stalker, 63 N. J. Eq., 596, where it was held that a similar contract was a wagering transaction, STEVENS, *V. C.*, said:

> "Our court of last resort holds that the ostensible agreement of the parties, even when reduced to writing, is not necessarily controlling, because it may be a mere cover. Hence it follows that, in cases of this character, the acts and correspondence of the parties are of more importance than their formal declarations. If from these acts and that correspondence it is seen that the transaction is, in reality, a dealing in differences, then the name or color given to it is of no consequence."

We will now discuss Rule 2 as to the probative value of the surrounding circumstances and the liberality with which they are received.

The following authorities express this rule:

Kenyon vs. *Luther*, 4 N. Y. Supp., 498.
Ball vs. *Davis*, 1 N. Y. St. Rep., 517.
Dwight vs. *Badgely*, 60 Hun, 144.
Peck vs. *Doran-Wright Co.*, 57 Hun, 343.
Yerkes vs. *Salomon*, 11 Hun, 471.
Mackey vs. *Rausch*, 39 N. Y. St. Rep. 232.
In re Green, 7 Bissell, 338; Fed. Cas. 5751.
Cobb vs. *Prell*, 15 Fed., 774.
In re Chandler, Fed. Cas. 2590; 9 N. B. R., 514.
Mohr vs. *Meisen*, 47 Minn., 228.
Kirkpatrick vs. *Bonsall*, 57 Pa. St., 155.
Lowrey vs. *Dillmann*, 59 Wis., 197.
Carroll vs. *Holmes*, 24 Ill. App., 453.
Hill vs. *Johnson*, 38 Mo. App., 383.
Croner vs. *Spencer*, 92 Mo., 499.
Cothran vs. *Ellis*, 125 Ill., 496.

These cases all hold that evidence may be received by the Court: (1) that in previous transactions between the parties deliveries had never been made; (2) that either of the parties was not financially able to carry out the contract according to its terms; (3) that by reason of a large number of similar contracts, one or other of the parties would not be able to carry them all out according to their terms; (4) the unfamiliarity of either of the parties with the conditions and circumstances governing the legitimate trade conducted in the commodities which were the subject matter of the contract; (5) if any one or more of these elements exist, the fact that the intention of one or both of the parties was not expressed is immaterial.

In *Dwight* vs. *Badgely* (60 Hun, 144), DANIELS, *J.*, said:

> "In this class of cases, all pertinent evidence should be received to discover the true nature of the transactions. The design generally is to avoid exposure and evade the law, and that should be prevented when it can be done by receiving in evidence all pertinent answers having the effect of disclosing the true nature of the transactions."

In *Mohr* vs. *Meisen* (47 Minn., 228), the Court said:

> "The understanding between the parties may be gathered from the facts and attending circumstances. This is well settled, and upon this point evidence of the defendant's occupation, residence, financial ability; that he never delivered or received or proposed to deliver or receive any grain; that he was not a dealer; and that the orders to purchase were made without reference to or far in excess of his ability to pay for, with other facts of like character, was competent."

And even where the rules of an exchange, of which one of the parties to the contract was a member and of which both parties had notice, provided that all contracts made thereunder should contemplate the actual delivery of the commodity under various pains and penalties, yet if it

was the real understanding of the parties to the contract that delivery should not be made the contract was void.

Mackey vs. *Rausch*, 39 N. Y. St. Rep., 233.
Embrey vs. *Jemison*, 131 U. S., 336.

A very interesting case is that of *In re Chandler* (9 N. B. R., 514, Federal Case No. 2590). The bankrupt Chandler engaged in a campaign to corner the oat market, buying oats for future delivery in huge quantities and selling "puts" for June in large amounts. He was adjudicated a bankrupt, and the holders of the puts attempted to prove their claims for the difference between the price fixed in advance and the market price. The total amount of claims was $400,000, and the whole amount which the bankrupt had received for the puts was less than $19,000. His assignee moved to expunge these claims, and BLODGETT, *J.*, granted the motion, saying:

> "The parties when they made them (the contracts) did not intend to deliver the grain but only at the utmost to settle the differences. They knew that they could not obtain the grain to deliver if Chandler sustained his corner, and their action in buying a put was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, to keep up a price through June to his own figures, and virtually a bet on his part that he could do so."

One of the leading cases on this subject is that of *Flagg* vs. *Baldwin* (38 N. J. Eq., 219). There a contract between a broker and his client with regard to purchasing stock for the benefit of the latter on margins was held void as a gaming transaction, and the Court of Errors and Appeals, speaking through MAGIE, *J.* (speaking of circumstances going to show the wagering nature of these transactions), said:

> "These enormous transactions were far beyond the ability of appel-

lants at any time, and were known to be so. * * * Under such circumstances, it is idle to pretend that there was or could be any hope or expectation that appellants were to take or could be required to take these vast amounts of stock. For respondent to have tendered them, and demanded payment for them, would have been absurd in the extreme. The whole circumstances show that no such right to tender entered into the transaction. On the contrary, the contract plainly was that if the stocks bought advanced, the profit was to be realized by a sale. If they declined, the remedy of respondent to save himself was by a sale. The settlement was to be of the profits and losses thus ascertained."

In Sharpe *vs.* Stalker (63 N. J. Eq., 596), speaking of the fact that through a long course of dealing between the parties, only once had the broker actually delivered to his customer the stock, the customer paying therefor in full, the Vice-Chancellor said:

"Now, if it were proved that, on one occasion out of a multitude of instances covering a long period of time, the customer had received from the broker a single certificate of stock, which he had actually paid for, it would seem to me that this proved, not that all the other transactions were not dealings in differences, but that, on this one occasion, the broker and his customer had deviated from their usual course of dealing, and had taken another course."

And again (p. 601):

"If the purchases and sales are very numerous and they have occurred through a long period of time, and all, with a single exception, point in one direction, it seems to me that the only reasonable inference that can be made is that the parties have been dealing in differences; and that they intended to deal in differences, except in the one case in which they, for some special reason, agreed otherwise."

In *Kirkpatrick* vs. *Bonsall* (72 Pa. St., 155), AGNEW, *J.*, said (p. 159):

"The defendants had shown by the plaintiff's own testimony that he was not a refiner of oil, or one who would buy for his own consumption; that he had not sold the oil when he made use of his call or option, and, therefore, had no contract of his own to fulfil; and also that he did

not intend to call for the oil if the market price had gone below the price fixed in the agreement. What intent would reasonably be inferred from these circumstances? Certainly the belief induced that there was not an intent to bargin for oil for a real business purpose. Now, if, besides this contract, it could be shown that many others of a similar kind were entered into by the same man, at and about the same time, certainly it would strenghten the conviction that the plaintiff was not a *bona fide* contractor in a legitimate business ; and if we then add to this the fact that he was financially unable to take and pay for the total amount of oil he had contracted for, that conviction would become more firm, and that the real nature of his contracts was a wager on the rise and fall of the price of oil."

It is apparent from the foregoing authorities that the law with regard to wagering contracts is well settled and that the only difficulty in cases of this character lies in applying the fixed principles to the individual cases.

III.

Application of these principles to the cases before the Court.

Upon the vital point of intention there can be but little doubt here. Ordinarily the question comes up between the two parties who have had transactions in some commodity, and the course of their prior dealings has to be shown, in order to determine what they really were contracting to do. In these cases at bar the question arises not between two such individuals but upon the sum of all the transactions made by all persons on the Chicago Board of Trade. That these were dealings in differences and not in commodities is proven, first, by the rules and customs of the Exchange, by which each night the contracts undergo a complete metamorphosis and become either

contracts with different people or a cash debit or credit, and, secondly, by all the surrounding circumstances; the physicial impossibility of making deliveries and the excess of transactions on the Chicago Board of Trade over the entire available grain production.

The question as to the validity of these contracts is an important one. If they are wagering contracts undoubtedly they are a great evil.

We respectfully submit that under the established principles the contracts which are here subject to review are wagering contracts and so void.

April, 1905.

Respectfully submitted.

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FILED
NOV 16 1904
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 224.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, PETITIONER,

vs.

CHRISTIE GRAIN AND STOCK COMPANY.

OBJECTIONS OF RESPONDENT TO CONSOLIDATION OF THIS CASE WITH CASE OF THE L. A. KINSEY COMPANY ET AL., PETITIONERS, vs. THE BOARD OF TRADE OF THE CITY OF CHICAGO, No. 280.

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SUPREME COURT OF THE UNITED STATES.

FILE No. 19,378. TERM No. 280.

RECORD FILED MAY 31, 1904.

THE L. A. KINSEY COMPANY ET AL., PETITIONERS,

vs.

BOARD OF TRADE OF THE CITY OF CHICAGO, RESPONDENT.

Answer of the Defendant to the Motion of Respondent to Set This Case for Hearing, Namely, The Board of Trade of Chicago against The Christie Grain and Stock Company, No. 224.

Now comes The Christie Grain and Stock Company, defendant in case No. 224 on this docket, entitled The Chicago Board of Trade against The Christie Grain and Stock Company, and, answering the motion of the said Board of Trade of Chicago in the above-entitled cause, says that it objects to the consolidation of the two causes and

their hearing and determination at one and the same time for the following reasons, to wit:

That the said two causes proceed upon different facts and involve different issues and considerations.

They also were not submitted upon the same testimony.

There are matters and considerations involved in the case in which respondent, The Christie Grain and Stock Company, is a party, to wit, case No. 224, that have no place in and may not be urged in case No. 280.

In case No. 280 there seems to be a large number of counsel who would desire to be heard, and they probably will expect to be heard fully with reference to their own cause. They have no interest and cannot argue matters appearing in case No. 224 which do not appear in and could not affect the ultimate decision in the above-entitled cause, No. 280. The decision in this case went upon a single one of several points and considerations that were urged in argument in the court of appeals; all of which points will of necessity be renewed in this court upon the hearing here, and no convenience of this court nor of counsel will be subserved by hearing the two cases as if they were one. In most, if not all, respects they are totally different.

All of which is respectfully submitted.

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Attorneys for Christie Grain and Stock Co.

[Endorsed:] The L. A. Kinsey Co. *et al.*, petitioners, *vs.* Board of Trade of the City of Chicago, respondent. Objections of Christie Grain and Stock Company to consolidation of causes.

[Endorsed:] File No. 19,299. Supreme Court U. S., October term, 1904. Term No. 224. The Board of Trade of Chicago, petitioner, *vs.* The Christie Grain and Stock Co. Objections of respondent to consolidation of this cause with No. 280. Filed Nov. 14, 1904.